This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

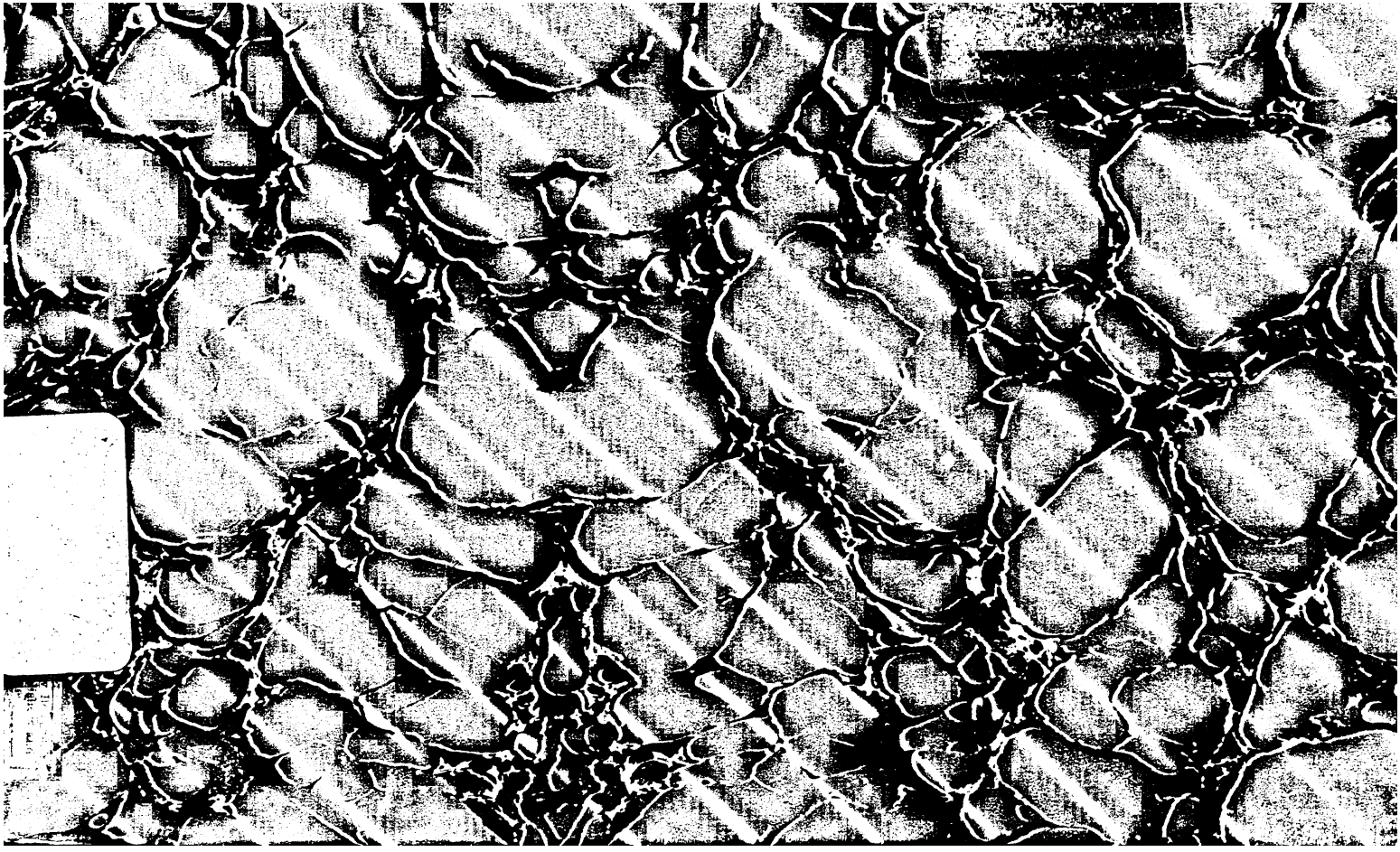
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



STANFORD LAW LIBRARY

DL
AWF
QCP

PRINCIPLES

OF

CONVEYANCING:

DESIGNED FOR THE USE OF

STUDENTS.

WITH AN

INTRODUCTION ON THE STUDY

OF

THAT BRANCH OF LAW.

BY CHARLES WATKINS, ESQ.
OF THE MIDDLE TEMPLE.

LONDON:
PRINTED FOR J. BUTTERWORTH, FLEET-STREET;
BY C. WOODFALL, NO. 22, PATERNOSTER-ROW.

1800

STANFORD LAW LIBRARY

TO

THE HONOURABLE

SIR FRANCIS BULLER, BART.

ONE OF THE JUSTICES OF

HIS MAJESTY'S COURT OF COMMON PLEAS,

THE FOLLOWING ESSAY

ON THE

PRINCIPLES OF CONVEYANCING,

IS

MOST RESPECTFULLY INSCRIBED

BY

HIS OBLIGED AND

OBEDIENT SERVANT,

CHARLES WATKINS.

MIDDLE TEMPLE,
EASTER TERM, 1800.

CONTENTS.

Page

INTRODUCTION — — — — — 1

BOOK I.

Of Eſtates and Intereſts as they relate to Conveyances.

CHAP. 1. Of an Eſtate at Will — — — 1
2. Of a Term of Years — — — 13
3. Of an Eſtate of Freehold — — 19
4. Of an Eſtate *pour autre Vie* — — 21
5. Of an Eſtate for Life — — — 24
6. Of an Eſtate in Dower — — — 25
7. Of an Eſtate by the Curteſy — — 31
8. Of an Eſtate Tail — — — 33
9. Of an Eſtate in Fee Simple — — 41
10. Of an Eſtate in Parcenary — — 44
11. Of an Eſtate in Joint-Tenancy — — 46
12. Of a Tenancy in Common — — 49
13. Of a Remainder — — — — 51
14. Of an Executory Deviſe — — 57
15. Of a Conditional Limitation — — 60
16. Of a Reverſion — — — — 62
17. Of a Right — — — — 67
18. Of a Poſſibility — — — — 69
19. Of an Equity of Redemption — — 70
20. Of Uſes and Truſts — — — 73
21. Of Powers — — — — 81
22. Of Rents — — — — — 88

CONTENTS.

BOOK II.

Of Conveyances as they relate to Eſtates.

		Page
CHAP. 1.	Of a Feoffment — — — —	95
2.	Of a Grant — — — — —	99
3.	Of a Gift — — — — —	102
4.	Of a Leaſe — — — — —	104
5.	Of an Exchange — — — —	107
6.	Of a Releaſe — — — — —	109
7.	Of a Confirmation — — — —	112
8.	Of a Surrender — — — —	113
9.	Of an Aſſignment — — — —	115
10.	Of a Defeaſance — — — —	116
11.	Of a Covenant to ſtand ſeized — —	117
12.	Of a Bargain and Sale — — —	119
13.	Of a Leaſe and Releaſe — — —	120
14.	Of a Deviſe — — — — —	123
15.	Of a Fine — — — — —	125
16.	Of a Recovery — — — —	132

BOOK III.

Of Conveyances with Reſpect to Parties.

		Page
CHAP. 1.	Of an Infant — — — — —	137
2.	Of Huſband and Wife — — —	141
3.	Of a Feme Covert — — — —	142
4.	Of the King — — — — —	144
5.	Of the Queen — — — — —	145
6.	Of Corporations — — — —	146

INTRODUCTION.

AMONG the many diſcouragements which attend the ſtudy of the law, there is none more obvious, or more generally complained of, than the want of method and direction.

To take a young perſon from an univerſity or a ſchool, where his mind has been occupied with other purſuits, and to toſs him headlong in the practice of the law, wholly unprepared, or with little preparation, for ſo arduous a ſtudy, is in itſelf ſo abſurd, that we can only wonder at its occurrence.

What muſt be the embarraſſment of ſuch a perſon, amid buſineſs of ſuch

nicety as to call forth the full exertion of the veteran in practice?—It is folly to expect from the human mind what a moment's reflection would tell us it would be impoſsible for the human mind to perform. Conveyancing is not intuitive any more than the mathematics. The mind cannot draw concluſions without having been previouſly furniſhed with premiſes. And however the individual may be prepoſſeſſed in favour of a peculiar mode of ſtudy, there are, and, while the human mind continues what it is, there muſt be general rules which ought to be attended to in the acquiring of knowledge.

We muſt be ſenſible that we can act with greater energy in proportion as our attention is confined. That attention becomes weakened as it becomes divided. We muſt analyze in order to comprehend with accuracy. We muſt underſtand the cauſe before we can embrace its conſe-

quences. It ſhould ſeem to follow, therefore, that in law, as in other ſciences, we ſhould begin with firſt principles, and form a general outline before we deſcend to the *minutiæ*.

A general outline the mind can eaſily embrace, and the general principles of law it can eaſily remember. When acquainted with a whole we may diſcern the ſymmetry of the parts; but an inſulated poſition will appear arbitrary, and its connection will not be ſeen. As difficulties ariſe, or new matter preſents itſelf, a general principle will afford us a rallying point; and we ſhall find ourſelves poſſeſſed of premiſes from which we may argue.

To a general outline and to general principles, then, ſhould the ſtudent be at firſt confined. To ruſh into miſcellaneous and unconnected reading is to ~~di-~~ *embarrass.* ~~vide~~

and diſtract the intellect; is to weary the powers of the mind with unneceſſary, and with uſeleſs, exertion. It is to contradict the ſuggeſtions of common ſenſe and experience, and to violate the rules which nature herſelf has impoſed.

But, in direct defiance of principles ſo obvious, how often do we ſee *Coke upon Littleton* or a volume of Reports put into the hands of a young perſon on his entering upon the profeſsion! From the miſcellaneous nature of ſuch writings, an idea is often effaced as ſoon as it is formed. The mind is hurried from ſubject to ſubject, without being ſuffered to dwell ſufficiently upon any. Points of the greateſt nicety, and learning the moſt abſtruſe are ſuddenly preſented to the view of a novice, which would perhaps puzzle the ~~ableſt head of the~~ moſt experienced lawyer. Deductions and conclusions

cluſions are given when the principles from whence they flowed remain unexplained and even unknown to the ſtudent.—The obſervations on *Littleton*, by Lord *Coke*, are wholly without method. Such a chaos of incoherent obſervation is by no means calculated for a regular peruſal. Our attention is frequently called from an anxious conſideration of a legal principle to a diſſertation on the *&c.* of Littleton, to an account of Sir William Hearle, or to a quotation from Virgil or Horace. Indeed, the want of method in moſt of this writer's works makes them more proper for occaſional conſultation than the peruſal of the ſtudent. His ſtrange quaintneſs and excentricities may make one ſmile; but they divert the attention and withdraw it from the ſubject to which we wiſh it confined.

That the *Commentary upon Littleton* contains a valuable fund of Common Law learning

learning is certain: but the obſervations are thrown together without order. Great as Lord *Coke* may be, the prejudice in his favour may, perhaps, be extravagant. His induſtry was aſtoniſhing; but he ſeems to have poſſeſſed little of the ſpirit of law: and whatever might have been his legal learning, the frequent illiberality of his ſentiments cannot be ſufficiently reprobated*; and the ſtudent ought to be cautioned againſt it.

A vo-

* The manner in which he treated Sir Walter Raleigh may be ſeen in the State Trials; and will be an object of execration while his name ſhall continue.

In Calvin's caſe (7 *Rep.* 17. a.) he ſays, "All infidels (among whom he reckoned the *Jews*, 2 *Inſt.* 507. are in law *perpetui inimici*, perpetual enemies, for the law preſumes not that they will be converted, that being *remota potentia*, (a remote poſſibility) for between them, as with *the devils, whoſe ſubjects they be*, and the Chriſtian, there is

A volume of Reports muſt, from its very nature, be full of unconnected matter; and, conſequently, be improper for early reading. The report of particular caſes may, indeed, be read by the ſtudent with advantage; but they ſhould be cautiouſly pointed out for his peruſal, and carefully explained.

---

is perpetual hoſtility, and can be no peace." The illiberality of Lord *Coke* with reſpect to the Jews has been deſervedly condemned, and held up to deteſtation, in the caſe of Omychund *v.* Barker, which is reported in a very ſuperior manner by *Atkins* (vol. I. p. ~~xl.~~) and which cannot be too ſtrongly recommended to the reader's peruſal. The argument of the Solicitor-General, Mr. Murray, (afterwards Lord Mansfield) is a maſter-piece of it's kind; and thoſe of the Lord Chancellor (Hardwicke) and the three Chiefs who aſſiſted him (Lee and Willes, C. J. J. and Parker, C. B.) were worthy of Chriſtians, as the ſentiments of Lord Coke were diſgraceful to him as a man, and much more ſo as a profeſſor of the Goſpel.

The

The number of reporters and the manner in which many caſes are reported are moſt ſerious evils; are evils which cannot be too much lamented nor ſufficiently expoſed. The contradictory ſtatements of the ſame caſe, the confounding the arguments, nay, aſſertions of the counſel, with the deciſions of the court, the *obiter* and extra-judicial ſayings of the Judges, with the grounds of the judgment, the obſervations of the reporter with the points of the caſe, call aloud for the niceſt and ſevereſt diſcrimination.

I believe it will be found on examination, that ~~a deference~~ an implicit ſubmiſſion to the aſſertions of our predeceſſors, whatever ſtations thoſe predeceſſors might have filled, has been one of the moſt certain ſources of error. Perhaps there is nothing which has ſo ſhackled the human intellect, nothing which

which has ſo retarded the progreſs of truth, nothing which has ſo greatly promoted whatever is tyrannic, prepoſterous, or abſurd, nothing which has ſo much degraded the ſpecies in the ſcale of being, as ~~a deference~~ the implicit ſubmiſſion to individual *dicta*. The blunders of one age (and blunders have occurred in all ages) cannot warrant the blunders of another. What was once expedient may now, by reaſon of a change of circumſtances, be improper. To appeal to matters of fact with reſpect to matters of right is, in itſelf, ~~ſo~~ prepoſterous, and absurd ~~that we ſhould have very great reaſon indeed to induce us to have recourſe to it~~. If we muſt be bound by former deciſions, let thoſe deciſions be given by the moſt unequivocal authority. Let the ſtatement of facts, the deciſion of the court, and the grounds and reaſons of that deciſion, be drawn up by a proper officer, and ſigned by the Judges who preſide.

Let not the crude notes of the dead be brought forward to miſlead the living. Let not the reputation of thoſe who have left us, and who are no longer able to defend themſelves, become the prey of the ſweepers of their cloſets. We ſhould conſider that many who took notes in court did not take them with a view to publication; but that they were frequently uſhered into public merely from the rapacity or avarice of thoſe who ſurvived. Compare *Rolle*'s reports with his abridgment. Look at the undetermined caſes in *Dyer*. Conſider how ſoon a quoted caſe becomes what is called authority, and conſider how ſoon authority ſhoulders out common ſenſe. It would not be difficult to point out many inſtances in which the adherence to the reports of adjudged caſes has overthrown the acknowledged principles of the law of the land, and, in effect, repealed the ſolemn

θ The famous Habeas Corpus Case was determined on the authority of precedents, directly in the teeth of Magna Charta and six other Statutes in 1627. "Precedents were read," says Selden; "acts of Parliament were passed over" (Seld. Works, v. 6. p 1956.8.) The substance of Sir Nich.s Hyde's curious apology for this violation of the Laws of the Country may be seen in 1 Rushw. Coll. 461. ⟶ Note to the 2.d Ed.n of this Book.

* See as to the Stat. of Uses, 1 Atk 591. in ⟶ Hopkins v Hopkins 2 Bla Comm. 335-6.; 6 Cough 774 &c/ ⟶ Note to the 2.d Ed.n of this book

ſolemn acts of the legiſlative body*? though the Judges had ſworn to adminiſter the laws inſtead of receiving authority to controul or reſcind them. If the acts of the legiſlative body become incompatible with the manners of the times, let us apply to the legiſlative body for their alteration or repeal, but let not the Judges become ſuperior to the legiſlative body.

"*Ita lex ſcripta eſt*," is the cry of many a man who would be angry with another that expreſſed a doubt whether he poſſeſſed ratiocination. About the time of paſsing the ſtatute of uſes ſome wiſe man, in the plenitude of legal learning, declared that

* In the celebrated Bewdley caſe, (which has been frequently recognized *as law!*) the practice of the Court for ſeven years was held ſuperior to an Act of Parliament! 1 *P. Wms.* 223. 2 *Str.* 755. 3 *Burr.* 1755.

there could not be an uſe upon an uſe. This very wiſe declaration, which muſt have ſurpriſed every one who was not ſufficiently learned to have loſt his common-ſenſe, was adopted, and is ſtill adopted; and upon it (at leaſt chiefly) has been built the preſent ſyſtem of uſes and truſts. Another, adopting juſt ſo much of an argument as anſwered his purpoſe, and rejecting a concluſion which followed from the ſelf-ſame premiſes, decreed that there ſhould be no dower of a truſt; and Chancellor after Chancellor ſubmitted to this ſtrange aſſertion, and followed it in defiance of every thing rational. "We are bound by precedent," ſay they: but are we not bound by principle alſo? Can precedent releaſe us from a moral obligation?

If reports of adjudged caſes be frequently found ſuch as I have noticed, it

ſurely

ſurely will be ſufficient to advert to them, in order to guard the ſtudent from relying upon them where the reaſon of the deciſion is not apparent.

When we argue from adjudged caſes, we argue from concluſions already drawn, and not from premiſes by which thoſe concluſions muſt be warranted. The more we are removed from thoſe premiſes, the greater the probability of error in our concluſions muſt neceſſarily be.

But ſuppoſing that a perſon ſhould be ſo fortunate as to be able to extract ſomething comprehenſible out of *printed* contradiction, yet other contradictions may make their appearance in *manuſcript*; and, overthrowing all his hard-earned knowledge, remind him once again of *the glorious uncertainty of the law.* Is the law of England to depend upon the private note of an individual, and to which

an individual only can have acceſs? Is a Judge to ſay—" Lo! I have the law of England on this point in my pocket. Here is a note of the caſe, which contains an exact ſtatement of the whole facts, and the deciſion of my Lord *A.* or my Lord *B.* upon them. He was a great, a very great man. I am bound by his deciſion. All you have been reading was erroneous. The printed books are inaccurate. I cannot go into principle. The point is ſettled by this caſe."—Under ſuch circumſtances, who is to know when he is right or when he is wrong? If concluſions from unqueſtionable principles are to be overthrown in the laſt ſtage of a ſuit by private *memoranda*, who can hope to become acquainted with the laws of England? And who, that retains any portion of rationality, would waſte his time and his talents in ſo fruitleſs an attempt? Is a paper evidencing the law of England to be buttoned up in the ſide-pocket of a Judge,

Judge, or to ſerve for a mouſe to ſit upon in the duſty corner of a private library? If the law of England is to be deduced from adjudged caſes, let the reports of thoſe adjudged caſes be certain, known, and authenticated. What an idea muſt a foreigner form of our laws when he conceives them either founded upon, or ſubject to be contradicted by, nobody knows what?

I acknowledge the utility of publiſhing the ſolemn deciſions of the Courts; but I ſay again, let the reports of thoſe deciſions be faithfully given, and ſtamped with authority; and let the grounds of ſuch deciſions be rational and apparent *. Let not the laws of England be picked out,

* It is but little conſolation to ſay, on the trial of a cauſe, "That caſe is not law," after it has miſled half the kingdom.

like diamonds from a dung-hill, from among ſuch crude and incoherent, ſuch unintelligible and contradictory matter as now loads our ſhelves. Let us ſeriouſly conſider the evils which muſt ariſe from ſuffering abſurdity to be conſecrated by uſe; and, when eſtabliſhed as a precedent, to interfere with, and perhaps to render nugatory, the undoubted principles of our laws.

If the laws of England are to depend upon the deciſion of a Judge, we ſhould remember that the deciſion of a Judge may overthrow them.

However well acquainted a perſon may be with adjudged caſes, he will ſoon find caſes occur in practice with which thoſe already decided will not altogether accord. In ſuch circumſtance he can only have recourſe to principle. The neceſsity of an acquaintance with principle, there-

*"It seems to me" said Lord Commissioner Eyre "that these "two cases, (Ackerley v Vernon and the attorney Genl. "v Downing) are in direct opposition to each other: but "it seems (also) to me, upon the best consideration, that "the former case is so determined, and is of such — "authority that every thing must yield to it" 1 Ves Jun 496. Barnes v Crowe.

It would require some ingenuity to reconcile the case of Burnaby v Griffin (3 Ves. Jun. 266.) and Mores v Hinde 5 ibid 692. though determined by the same Chancellor. In the former it was ruled that a Feme Covert who was entitled to rents and profits during her life for her separate use might make an equitable bar to the Precipe; but in the latter, it was held, that, though the feme Covert was so entitled, and even though the Rents and Profits were expressly given to the intent and purpose that they might be "solely at her own disposal" she could not charge them. Which of these cases then is law? ~~Which of these cases then is law?~~ If the latter, the recovery which was supported in the former, must be good for nothing; And if the former be law the latter cannot ~~be~~ well be so. The feme Covert must have had power to transfer or charge her interest or not had power to do so. — To say that she had such power, and that she had not, would be a contradiction in terms: and it should seem therefore that these cases are also contradictory.

"The absurdity of Lord Lincoln's case is shocking." "However it is now Law": said Lord Mansfield in the case of Doe v Rott (Bougl 722.

A power was given to a person to appoint by writing under seal: and she made a will a codicil on stamped paper; and according to the report in the case of Sprange v Barnard (2 Brown's C.C. 585.) it was held at the Rolls, to have been a good execution of the power: "The stamp being equivalent to a seal" But surely if the stamp can be considered as

(Turn over

a seal, it must be that of the Commiss.rs for managing the stamp duties, or at least of Government, and not of the person writing on the paper stamped. If I sign a receipt for 50£ upon a stampt paper, will the receipt be an instrument under seal.

fore, is too apparent to be further inſiſted on.

Another claſs of writings which the ſtudent ſhould avoid, or, at leaſt, read with extreme caution, is that of detached arguments on caſes which have been adjudged. Arguments thus publiſhed, when preſented under the ſanction of general reputation, and crouded with a profuſion of legal reference, are too often calculated to miſlead. The ſtudent muſt not be ſatisfied with aſſertion, or carried away by the name of an author. If he cannot confront argument with argument, and receive the neceſſary *data* on *both* ſides of the queſtion, he ſhould ſuſpend his judgement: he muſt not decide upon *ex parte* evidence. Beſides, ſuch arguments are, for the moſt part, on points of much nicety, and which ſeldom ariſe; and he ſhould defer the conſideration of ſuch till he has made himſelf maſter of principles

more general, and of propoſitions more obvious and evident.

Fort bien! When ſucceſs has attended a peculiar mode of ſtudy, it may be reaſonable to ſuppoſe it to be juſt, and warrantable to recommend it to others. I would, therefore, adviſe the ſtudent to begin with a general outline: he may fill it up at his leiſure, as he may find himſelf prepared for the undertaking: to confine himſelf at firſt ſtrictly to principles; and, when he meets with technical terms, to be content with a mere explanation, and not purſue the ſubject of that term any further, as it will only withdraw his attention from that which he meant to purſue. It is the great fault of our Law Dictionaries, generally, that they partake too much of the nature of abridgments. But a dictionary and an abridgment are very different things, and ought to be kept apart. It is much to be wiſhed that a

Law

Law Dictionary might be given which would comprehend merely the terms of art, and those obsolete words which occur in old legal or historical writers.

His general books may be *Finche's Law*, *Blackstone's Commentaries*, *Wynne's Enomus*, *Hale's Common Law*, *Reeves's History*, *Sullivan's Lectures*, *Dalrymple on Feudal Property*, *Littleton* (without the Commentary), the Freehold part of *Gilbert's Tenures*, Select Notes of Mr. *Butler* to *Co. Litt.* *Touchstone*, and *Fonblanque on Equity*, with *Francis's Maxims*.

Having gained a general view of the Law, and being taught to divide his subject, he may pursue it as far as his inclination may lead him. He may go up to *Puffendorf* or *Grotius*, or down to a volume of reports, or the fleeting publications of the day.

I re-

I recommend the Commentaries of *Blackstone* as a general book. The intention of that ingenious writer was to give a comprehenſive outline; and when we conſider the multiplicity of doctrine which he embraced, the civil, the criminal, the theoretical and practical, branches of the Law, we muſt confeſs the hand of a maſter. But in the *minutiæ* he is frequently, very frequently inaccurate. He ſhould, therefore, be read with caution. The ſtudent in reading him will often require explanation and correction from him whoſe duty it is to inſtruct.

Noy's Maxims, in all the editions, are too incorrect to be entruſted in the ſtudent's hands. *Perkins* has too many quæries; though *Perkins* may be gone through with advantage, if accompanied with oral explanation.

The

The following pages have been alſo found to yield aſſiſtance to the ſtudent; and they are now preſented to the world in the hope that they may be more extensively ſerviceable than they could have been if confined to manuscript ~~to others~~. The mode of reading them was this:—The ſtudent, after being acquainted with ſome general books (as before recommended), read the work entirely through, that he might form a view of the whole. He then began again, and read chapter by chapter; conſulting the books, or portions of books referred to, but confining himſelf ſtrictly to the ſubject of the chapter immediately before him; and the whole was accompanied with oral explanation whenever he felt himſelf at a loſs. He pauſed between the chapters, when the connection was not immediate, that there might be no concuſsion of ideas, or that an idea formed on one ſubject might as little as poſsible be effaced by an idea on another.

The

The ſtudy of the laws of a country, and eſpecially of laws which have been accumulating for many, many centuries, muſt neceſſarily be attended with labour. But we ſhould not intimidate the ſtudent at the threſhold with unneceſſary embarraſſment. Much labour may be prevented by method, and much diſguſt by a favourable impreſſion.

To prove that the profeſſion of the law is an honourable profeſſion, we muſt ſhew it to be enlarged in its principles, and liberal in its practice. To have gentlemen and men of genius in the profeſſion, we muſt ſhew the profeſſion to be ſuch as a gentleman and a man of genius may purſue.

Law ſhould be conſidered as a moral ſcience, as the rule of rational and accountable beings. The profeſſion of the Law was inſtituted merely for the furtherance

ance of juſtice and the preſervation of right; ſhall we pervert it, then, to the ſuppreſsion of what it was ordained to ſupport? Shall we repreſent it as incompatible with any thing that is liberal, or manly, or uſeful? If the profeſsion can only be purſued by abandoning the rigid dictates of moral rectitude, the nicer feelings of humanity, or the exertion of the nobler powers of the mind, it is a profeſsion which it would be criminal in man to purſue. The conduct of ſome of its profeſſors has, indeed, ſubjected it to much contempt; and from thoſe who muſt regard it with contempt it is folly to expect admiration: and the conduct of many who profeſs themſelves its friends, tends but little to remove the odium it has ſhared.

It is ridiculous to hear a perſon, who boaſts that his profeſsion is *an honorary* profeſsion, talking inceſſantly of his fees.

It

It is ridiculous to hear a perſon who, in a court of juſtice, wilfully embarraſſes a witneſs for the ſake of gaining his cauſe, right or wrong, call his profeſsion an *honourable one*. It is ridiculous to hear a perſon talking of *the honour* of his profeſsion, who receives a ſum of money for diſcovering a loop-hole in a title merely to enable his employer to creep through, that he might reſcind a contract which he had entered into with his eyes open, and which every principle of moral rectitude ~~would~~ will oblige him to perform.

We may talk as much as we pleaſe about the honour of a profeſsion of which a conduct like this forms a part; but, while a conduct like this forms a part of a profeſsion, no man of common honeſty or of common ſenſe can ceaſe to regard it with contempt.

But

But by ſhowing that a conduct like this is only the perverſion of individuals;—that the profeſsion, ſo far from requiring it, is diſgraced by a conduct like this;—that it affords field for the exertion of the moſt tranſcendent abilities, and the moſt benevolent inclinations;—that it is compatible with whatever elevates or adorns the character of man,—can we only hope that the profeſsion will own the Good and the Great.—It is by ſuch means only that it can retain its wonted place in the ſcale of ſcience, and be rendered worthy of the human mind.

If the day be not yet come, the day is very faſt approaching, when knowledge ſhall be juſtly appreciated; when ſyſtematic pedantry ſhall no more acquire the reputation of learning; when thoſe literary purſuits, which incumber the memory without calling forth the exertion

of

of intellect, or amending the heart, ſhall be deſervedly reprobated; when prejudice ſhall melt away before the genial beams of inveſtigation and truth; and when learning ſhall only be eſteemed as it becomes ſubſervient to the virtue, and, of conſequence, to the happineſs of mankind.

PRINCIPLES

Note.

The observations on the following work of Mr. Watkins (referred to by small letters) are understood to be by Mr. Preston -

PRINCIPLES

OF

CONVEYANCING, &c.

BOOK I.

OF ESTATES AND INTERESTS, AS THEY RELATE TO CONVEYANCES.

CHAP. I.

OF AN ESTATE AT WILL.

AN Eſtate at Will is not bounded by definite limits with reſpect to time; but as it originated in mutual agreement, ſo it depends upon the concurrence of both parties. As it depends upon the will of both, the diſſent of either may determine it. Such an eſtate or intereſt cannot, conſequently, be the ſubject of convey-

2 *Blackſt. Comm.* ch. 9. p. 145, to the end. *Litt.* b. 1. ch. 8. and the Comment.

ance.[a] Could the *leſſee* (for he is not a *termor*, as a termor is co-relative with a *term*, or *definite* event,) convey the premiſes to another, he would determine *his own will* to hold. He himſelf would be no longer a tenant; for he cannot be a tenant and not a tenant at the ſame time; and by the transfer he would part with *his own intereſt*. As the tenancy *is at will*, it muſt, of conſequence, be at the will of the leſſor as well as of the leſſee. Now, if the transferree could become a tenant, it would be independently of the will of the leſſor, and conſequently would not be a tenant at *his* will, and conſequently ~~it~~ the eſtate would not be a tenancy at will at all, as the will muſt be in ſuch caſes *reciprocal*. Should the leſſee introduce a ſtranger into the tenancy *with* the aſſent of the leſſor, it would not be a transfer of the *leſſee*'s intereſt or eſtate, for *his* intereſt or eſtate would be by the very act *determined*; but a *new* eſtate at will would be created, ſince the original leſſee would relinquiſh or abdicate *his* intereſt or eſtate, and the ſtranger would take an eſtate, by the immediate

(a) transmission.

2) But this is the only instance at this day in which there can be a tenancy at will by construction of law.

To make a tenancy at Will at this day (except in the instances which have been and will be noticed) there must be an express demise to hold at Will.

At this day all leases made generally and not for any particular period are by construction of law leases from year to year

A Tenancy at Will must at this day arise either:

1 From a demise expressly at Will;
2 From an entry by consent of the owner under a defective assurance;
3 On an entry under a charter of feoffment before a livery of seisin is made (Litt. S. 70)
4 When a lease for a term could operate as a forfeiture;

Every lease at Will is necessarily at the will of both parties, tho' it is expressed to be at the will of one of them only (Co. Litt 55.(a) Moore 775)

Sed 2?. Is there any instance in which a lease from year to year will by the common law amount to a forfeiture?

The only instance of it is one in the case of Copyholds, but even of a copyhold, there may I apprehend be a lease from year to year by construction.

diate act of the leſſor, which had never been in the original leſſee.

But as it is reaſonable that a perſon ſhould reap what he has ſown, and as the greateſt part, if not the whole, of the year, is requiſite for the purpoſes of agriculture in its preſent ſtate, the law does not favour an eſtate at will; and if the rent be reſerved yearly or half-yearly, it frequently takes the circumſtance as evidence of a *term*; *i. e.* of a leaſe for a year, or from year to year. Yet as ſuch a preſumption is merely for the furtherance of juſtice, if ſuch conſtruction would, on the contrary, be productive of wrong, ſuch conſtruction cannot take place; according to the maxim that a conſtruction of law, as ſuch, ſhall do injury to none. As, for inſtance, if a leaſe from year to year would work a *forfeiture*, there can be no reaſon for conſtruing ſuch a demiſe a leaſe for a year rather than an eſtate at will.

Bull. Niſi Prius, 84. 2. *T. Blackſt. Rep.* 1173. 2 *Bl. Comm.* 147.

But a leſſee at will, though he cannot transfer his own intereſt, is capable of accepting a releaſe of the inheritance from

Litt. Sect. 460. *Co. Litt.* 270. b.

his leſſor, on ſuch leſſee's entry into the premiſes: for he has a notorious poſſeſſion on entry, and the reverſion or inheritance may be releaſed to ſuch an one.(a)

The ſtudent ſhould, however, be informed that there are caſes in which it has been held, that an eſtate at will does not, at this day, in reality exiſt. But, in order to prevent his being miſled, the following obſervations are ſubjoined, and recommended to his conſideration.

The exiſtence of an eſtate at will was acknowledged in the caſe of Doe *d.* Bree *v.* Lees, 2 *J. Blackſt. Rep.* 1171. *Bull. Niſi Pri.* 85.—2 *Bl. Comm.* 146.

An eſtate ſtrictly at will was, however, in ſome inſtances, found inconvenient, and accordingly the courts did not favour it; but if the caſe admitted of a different conſtruction, they gave it a different conſtruction, and declared the demiſe a demiſe

(a) But the estate of tenant at will cannot be the foundation of a remainder (Bac abridgmt. chap Remrs) and therefore all remrs limd? expectt on an estat Will are void

---

(2? edit?

But though it is enacted by the Statute of frauds (29 Car 2. c.3. S. 1.) that a Lease by parol for a longer term than 3 years, shall have the force & effect of an estate at Will only, it is proper to inform the Student that there are cases in which a Lease by parol for a longer term than 3 years has been deemed to create a tenancy from year to year (5 Dunford & East 471. Doe d Rigge v Bell 5 ibid 3- Clayton v Blakey.) and consequently as not having the force and effect of an estate at Will only.— To page 6

miſe from year to year. They did not pronounce it an eſtate at will, and deny it the eſſential of an eſtate at will: this was a refinement in abſurdity which future days were to acquire. But they ſaid This demiſe is *not* an eſtate at will, but from year to year.

A claſs of caſes next came that cut the matter ſhorter. Inſtead of determining when the admiſsion of an eſtate of will was adviſable, or not adviſable, they denied its very exiſtence. See 5 *Durnf.* & *Eaſt*, 471, Doe *d.* Rigge *v.* Bell.—8 *D.* & *E.* 3. Clayton *v.* Blakey—and ſee 3 *Burr.* 1609, in Timmins *v.* Rowlinſon.

In Doe *d.* Rigge *v.* Bell, Lord Kenyon is repreſented as ſaying, "Though the agreement (for ſeven years by parol) be *void* by the ſtatute of frauds *as to the duration of the leaſe*, it muſt regulate the terms on which *the tenancy ſubſiſts* in *other* reſpects, as to the rent, the *time of the year when the tenant is to quit*, &c. Now in this caſe it was agreed that the defendant ſhould quit at Candlemas, and though the

agreement is *void as to the number of years for which the defendant was to hold*, if the leſſor *chuſe* to determine the tenancy *before* the expiration of the ſeven years, he *can only put an end to it at Candlemas.*"

Now it would be no common exertion of the human intellect to conceive how a tenancy could *ſubſiſt* in *other* reſpects, or in *any* reſpect, *after its duration had ceaſed by a poſitive act of parliament*; or how the leſſor ſhould not be at liberty to determine the tenancy at his pleaſure, after it was made a leaſe at *his* will as well as at the will of the leſſee, by the ſame act of parliament; or how it could be an eſtate at will at all, if the leſſor could *not determine it till a certain fixed period.* If the leſſor ſhould *not* have choſen to determine the tenancy *before* the expiration of the ſeven years, was it to be a tenancy for ſeven years in defiance of the act of parliament? Such an eſtate muſt be either an eſtate at will, or *not* an eſtate at will. If it *be* an eſtate at will, then it may, from the very nature of the thing, *be determinable at any time*; and if it be *not* an

eſtate at will, then the ſtatute of frauds and perjuries is, as to this point, in effect, repealed by judges who had ſworn to adminiſter the laws of which that ſtatute formed a part. For it would be the very apex of abſurdity to ſay that, though it *be* an eſtate at will *in other reſpects*, yet it is *not* an eſtate at *will with reſpect to its duration*; for if it be *not* an eſtate at *will with reſpect to its duration*, it can be *no eſtate at will at all*. And it certainly can be no eſtate at will with reſpect to its duration, if it *be not determinable till a given period*.

Transfer to p. 9.

↳ See page 9. This clause to come in at the end of the next Note.

Now, as The ſtatute of frauds expreſsly declares, that ſuch a demiſe ~~ſhould~~ ſhall "have the force and effect of a leaſe or eſtate *at will* ONLY, and ~~ſhould~~ ſhall not, either in law or equity, *be deemed or taken to have* ANY OTHER, *or* GREATER *force or effect, any conſideration for making ſuch parol leaſe* or eſtate, or any former" (the ſtatute could not, from the very nature of the thing, provide againſt any future) "law or uſage to the contrary notwithſtanding," ~~Now~~, in an unqualified manner to aſſert that that eſ-

tate which the ſtatute poſitively declared ~~SHOULD~~ shall *be an eſtate* AT WILL ONLY, *and* ~~SHOULD~~ shall NOT, EITHER IN LAW OR EQUITY, BE DEEMED OR TAKEN TO HAVE ANY OTHER OR GREATER EFFECT, ~~should~~ shall NOT *be an eſtate at will only*, but ~~SHOULD~~ shall *be deemed and taken to have* ANOTHER AND GREATER EFFECT, is certainly very bold, if not as certainly very wrong.

From Roke in f4 In Clayton *v.* Blakey, Lord *Kenyon* is made to ſay, "The meaning of the ſtatute was that ſuch an agreement *ſhould not operate* AS A TERM. But what was then conſidered as a tenancy at will, has ſince been properly conſtrued to enure *as a tenancy from year to year.*" Now, what is *a tenancy from year to year* but a *term?* In Doe *d.* Rigge *v.* Bell, his Lordſhip expreſly held that the landlord could not determine the tenancy *till the end of the year.* But if the tenancy was not determinable *till a definite period*, it is humbly apprehended that A TERM *did exiſt*, contrary to the ſtatute in that caſe made and provided, whatever ~~his Lordſhip~~ may be ~~pleaſed to ſay~~ decides to the contrary of that ſtatute

✠ Note by the editor to 2d edit.n — The Reporters of this case seem to have entered completely into the spirit of it, for it is said in the margin of the report "Though by the Statute of Frauds it is enacted that all leases by parol for more than 3 years shall have the effect of estates at will only such a lease requires as a forbearance from year to year" ~~but has been deemed to create a tenancy from year to year~~ Doe d Rigge v. Bell 5 East 471 Doe d Bliss v. Chadwick Blakey ~~and consequently has not having "the force and effect of an estate at Will only."~~

A. Notwithstanding the following intemperate passage, there is no sort of absurdity in the law construing the estate at Will mentioned in the Statute to be an estate from year to year, if the purposes of general convenience require it.

2. edit. The following clause to be inserted after the clause from page 69.

The Truth therefore seems to be that where a person leases lands to another by parol without expressing the time for which the lessee is to hold, the law will avail itself of the circumstances which the demise presents in order to construe such a lease as creating a tenancy from year to year, rather than a tenancy at Will; but where a person leases lands to another by parol for a longer space of time than 3 Years from the making of such lease, the statute interferes by declaring it an estate at Will and precludes it from saying that it is not an estate at Will, but a tenancy for a year because such a tenancy would not be an estate at Will

The courts may give a reasonable construction to the agreement of individuals; but the courts have not nor can they have without making the executive superior to the legislature power any authority to repeal a

in any wife notwithſtanding. For it would be confounding of ideas, it would be an abuſe of language, it would be an inſult to common ſenſe, to affirm that an eſtate of a *definite duration* was *not* a *term*; or that an eſtate at *will* was *independent on volition; and the Statute expreſsly declares that the eſtate in queſtion ſhall be an Eſt at Will* — *a Clause from page 7 here in the 2d. ed.*

It ſeems indiſputably laid down that if, on the eſcheat of a copyhold, the lord had leaſed the premiſes ſo eſcheated *at will*, he might grant thoſe premiſes again by copy; but if he had granted them for *a term* their demiſable property would have been for ever gone. The reaſon of the diſtinction was evidently this: if the premiſes were *at will* they were always demiſable, *as the lord might determine the leaſe at his pleaſure*; and ſo *was always at liberty to demiſe if he had choſen to do ſo.* If the premiſes were leaſed for *a term*, the lord *could not during the exiſtence of that term demiſe the premiſes to another.* In this latter caſe, therefore, the premiſes were *not* demiſable by copy, being already demiſed for a common law intereſt; for when it is ſaid that it is eſſential to a grant of copyholds

Omitted in 2d. edit.

copyholds that they muſt be either demiſed or demiſable, it means, manifeſtly, that they muſt be either demiſed or demiſable *by copy*, and not that they be demiſed or demiſable in any other way.

Whether the premiſes were leaſed by *deed*, or *parol*, made no difference in this reſpect: for the only queſtion was, whether *a term*, or *ſuch an eſtate which the lord could not reſcind at his pleaſure*, did or did not exiſt? If ſuch a term *did* exiſt, then, *during ſuch term*, the lands were *not* demiſable; but if *no period had occurred at which the lands were not demiſable*, in caſe the lord had choſen to demiſe them, *then* the property of the land was *not loſt*.

Suppoſe, therefore, that the lord ſhould, at this day, make ſuch a leaſe of ſuch eſcheated lands as would have been a leaſe at will before the ſtatute of frauds, the queſtion would be, whether ſuch a leaſe would, or would not, prevent him from granting thoſe lands by copy of court-roll?—But, before this queſtion can be determined, a previous one muſt be ſolved, namely, whether

contradict a positive act of Parliament.
If an Act of Parliament be absurd or
impolitic, or inconsistent with the manners
of the times, let it be repealed or altered
by the powers by which it was enacted
but till it be repealed or altered, by the
powers by which it was enacted it ought
be obeyed if not contrary to the Laws of
God.

ther ſuch a leaſe be, at this time, *a leaſe at will*, or *not a leaſe at will?*

Now ſome of the caſes which have been cited, abſolutely deny the exiſtence of an eſtate at will; and ſay that that eſtate, which formerly was an eſtate at will, is now an eſtate from year to year, and only to be determined at the end of the year; and if ſo, it muſt follow of neceſsity, that *till* the end of the year the premiſes are *not* demiſable by copy; and, by conſequence, that the demiſable property of the premiſes *is loſt*, as if it ceaſe for a moment, it would be gone for ever.

An eſtate at will, they tell us, can, at this day, exiſt only *notionally*. Now, can a *notional* eſtate at will, or an eſtate in *idea*, counteract a *term in fact?* Or will they tell us, that though it be *not* an eſtate at will, yet *that it ſhall have the properties of an eſtate at will*, and ſo the demiſable quality of the lands be *ſuppoſed* to continue? This would be a *notional* quality of an eſtate with a witneſs. This would be to ſay that a thing *is* what *it is not*; or that

that it ſhall *have properties inconſiſtent with its nature.*

But, on the other hand, if we conſider that the courts endeavoured to conſtrue thoſe eſtates to be terms from year to year, rather than to be eſtates at will, merely for the purpoſes of civil convenience, we may conclude that ſuch conſtruction ought not to take place when an inconvenience does not exiſt, or where a convenience to one party would *work a wrong to another*; and, conſequently, that an eſtate at will *may*, and *actually does, exiſt at preſent*; and, conſequently, that *lands may be granted by copy, though ſo leaſed by the lord to another perſon.*

omitted in the 2d edit.

If this be acknowledged, we ſhall be able to diſpenſe with a great deal of very learned confuſion, and be neither obliged to deny thoſe principles which cannot be diſproved, nor to incumber them with unneceſſary nonſenſe.

CHAP.

(a) See essay on estates in introductory chapter

If the nature of the certainty of the commencement and of the determin^n requiring some explanation, it will be found in the essay on estates chapt. Years;
A Term is called a "Term for years", even though the term is for one year only [A]

[A] Or even for less see James v Dean 11 Ves J. & 15 Ves Junr. S.C.

CHAP. II.

OF A TERM OF YEARS.

THE next eſtate, with reſpect to the duration of intereſt, is that which the law denominates *a term*; and it is ſo denominated becauſe its duration is *abſolutely defined*. The duration of an eſtate at will is dependent upon *the pleaſure of each party*; and an eſtate for life, in tail, or in fee, is *uncertain* in its duration, as its continuance is dependent upon an uncertain event; that is, upon the death of the individual, or the extinction or failure of heirs, either ſpecial or general.(a) Hence, then, muſt a term, from its very nature, have a certain beginning, or definite commencement, and a certain or definite period beyond which it cannot laſt.(b) But, however ſhort its continuance be deſigned, it is a TERM, and is called a *term for years*.

2 *Bl. Comm.* c. 9. ſ. 1. p. 140—5. & c. 20. p. 317. *Litt.* b. 1. c. 7. & the *Comment. Touchſt.* 266. ch. 14. *Bacon's Abr.* tit. Leaſe.

But,

But, though it be eſſential to its very exiſtence that there be a time abſolutely prefixed *beyond which it cannot continue*, yet it may be made ſubject to a condition for its determination before the period prefixed: as for 99 years, *provided A. B. live ſo long*. Here, if *A. B.* die before the 99 years expire, the term ſhall ceaſe; but though *A. B.* ſhould ſurvive the 99 years, the leaſe, on the expiration of the 99 years, would be abſolutely at an end.(a)

The grant of ſuch an eſtate is uſually entitled *a demiſe*, or *leaſe*; and the proper words of creation are thoſe of "demiſe, leaſe, and to farm "let;" though it may be created by other means, as by bargain and ſale, though without enrollment.(b)* It only relates to the *poſſeſſion*, and does not affect the *ſeiſin* of the lands.(d) It is what the law calls a *chattel intereſt*,(e) and is not an eſtate of freehold, though it be for 10,000 years. Hence, if it be wiſhed that *A. B.* ſhould enjoy certain premiſes while he lives, it ſhould be enquired into, whether it be the intention of the parties that the eſtate of *A. B.* ſhould have the properties of a freehold or

See the next Chapter.

* The Stat. 27 Hen. 8. c. 16 is confined to not; those Bargains and Sales by which Eſtate of Inheritance or Freehold is intended to paſs.

(a) This is generally called a term for years determinable on lives, or a term of years with a Collat. Determ.
(Essay on Estates & Lifs) and it is observable that if a demise is made for 99 Yrs if A & B shall so long live, the term will determine on the death of such one of them, as shall first die. Hence the use of the words "If the said A & B or either of them shall so long live" when the intention requires that the term shall continue till the death of these persons.

It is also to be observed that a lease to A & to A & B for the lives of A & B. will continue until the death of the Survr of them altho' there is no provo to that effect in express terms — } Essay on Estates ch. Life

Another distinction occurs; a Lease to A so long as A & B shall be Justices of Norfolk will determine as soon as either of them shall cease to be employed in that office.

(b) It is rather the mode of creation which is called a demise or lease: & the estate itself is called a term. Sometimes indeed the word "Lease" is used as synonymous to ~~what is~~ the word "Term".

(c) It may also be created by a devise in a Will or by a conveyance to uses.

(d) This is true in the sense in which Mr. Watkins applies the terms, but a lease may confer a right to the reversion and to the rent as annexed to the reversion.

So there may be a term in Remr and while a term is an estate in reversion or remainder it does not give any right to the possession.

(e) See Powell's, Woods introduction

(a) The word "If" is the more technical word
b. By a Common Law Lease
c. But he may release his interesse termini; and at this day M.r Pinelines to think an inst.t in in the form of a surr.r would operate as a release and might be pleaded accordingly
(d) A Term also created by bargain and sale (unless from the form of the limitation it is an interesse termini) vests immediately and becomes an actual estate on the execut.n of the bargain and sale L.2 Co.p 35. + Heywards Case] This is the very foundn of the Conveyance by Lease and Release. The Lease operating as a bargain and sale for one year, and the release as a Common Law assurance in enlargement of the estate vested in the Bargainee [Baker v Keate. 2 Mod. 249.—Butler's Co. Litt 271.b.n(1) Sanders on Uses]
(e) So is an interesse termini — Prestons Tracts 30.
f. And even in that case, the Lessee may assign, but the assignment will give the Revr the right of reentry if he thinks proper to avail himself of the condition. But he may dispense with the forfeiture as by accepting rent confirming &c and in that case the title of the Assignee will be as indefeasible.

not; as to ſupport a contingent remainder; to have the right of election of members of parliament, &c. If it *be*, the eſtate may be limited to *A. B. and his aſsigns during his life*; if it be *not*, it ſhould be limited to *A. B. and his aſsigns, for a certain number of years, provided the ſaid A. B. ſhall ſo long live. In the former case the freehold must be passed by Livery of seisin or — under the Statute of Uses.* (a) *see the next chapter*

As this eſtate affects only the poſſeſsion and not the ſeiſin, it may be made to commence *in futuro*, as from Michaelmas-day next. But, on the demiſe of a term, no eſtate is veſted in the leſſee; it only gives him a right of entry; and, till he actually enter, he has only an *intereſſe termini*. He cannot, *before* entry, receive a *confirmation* * or *releaſe* † from the leſſor; nor can he *ſurrender* ‡ his intereſt, except by a ſurrender in law, as by accepting another leaſe incompatible with the exiſtence of the firſt. (b) (c) (d)

(b) 5 *Co.* 123. b. Saffyn's caſe.

* *Co. Litt.* 296. a. & n. (2.)
† *Ib.* 270. b.
‡ *Ib.* 338. a.

An eſtate for years is aſsignable, (e) unleſs there be an expreſs condition or proviſion in the leaſe to reſtrict the power of alienation which the law gives; and ſuch aſ-

(e) *Doct. & Stud.* 27. *Dial.* 1 ch. 8.

ſignment

ſignment may be made even before the leſſee enter, as an *intereſſe termini* may be granted over. Or if a leaſe be made to *two*, one may releaſe to the other before entry.

Co. Litt. 46. a.

And as a leſſee may grant over his *whole term*, ſo he may make an under-leaſe of *a part* of his intereſt. As if he have a term of ten years, he may under-let for five; and the diſtinction between an aſsignment and an under-leaſe is, where the leſſee parts with his *whole* intereſt, and where *not*; in the *latter* caſe it is an *under-leaſe*, in the *former* an *aſsignment*. In an aſsignment, the operative words are, "aſsigned, transferred, and ſet over;" and in an under-leaſe, the ſame words are uſed as in the original one.

Touchſt. 300. ch. 17. 2 Bl. Comm. 326. Co. Litt. 337. b. 338. on ſect. 636.

On the entry of the leſſee, he may ſurrender to his leſſor, either by a ſurrender in deed or in law. On a ſurrender in deed, the operative words are, "doth ſurrender, "yield up, and for ever quit claim," and to ſuch ſurrender it is adviſable to make the leſſor a party, and that he execute the

(a) and the underlease a term may be surr? to him.

(b) and therefore if a Lease for 10 years demises for 20 years, the instrument operates as an assignment not as an underlease.

(c) From a seller the formal words generally used are "grant bargain sell assign transfer and set over" From a Mortgee a Trustee are "bargain sell assign transfer and set over" only.
and frequently the Words of assignment are by cautious practitioners qualified so as to exclude any implicon of a warr. 4 Cov. (A)

(d) To these words it is now very common to add words of assignment to the Lessor, if by reason of some intermediate estate it cannot operate as a surr.

(A) But considered as having a legal operation, the distinction between the words aforement. is now exploded. (Butler's note to Co. Litt. fo. 304. a note 1.

(a) His assent will be presumed unless the contrary appears; but an estate cannot vest in any one against his will, a Grantee, Lessee &c. Remr. Man &c. may as. agst himself render the Grant &c a Nullity, by disclaiming or disagreeing to the Limitation in his favour.

The execution of the Grantee &c of the deed cont? the grant is very proper when there is any wish to have distinct evidence of his acceptance of the grant &c since he cannot afterwards disclaim

(b) But if there is a forfeiture of the first lease the estate of the 2? Lessee will be defeated.

In one case the 2? Lessee claims under the title of the 1st Lessee and an alien? of the 1st Lessee cannot defeat a prior alienation by him.

In the other case the 2? Lessee as well as the 1st Lessee has a title depend? on the orig? lease, & any forfeiture of that lease will affect all persons deriving any title under the lease.

(c) and when devised for life, the quasi Tenant for life has the whole of the term in him in point of legal estate determinable on his death -

Land

deed, that his aſſent may be apparent.(a) A ſurrender in law is, as before obſerved, the acceptance of another leaſe incompatible with the firſt.

But if a leſſee for twenty years underleaſe for ten years, he cannot, by ſurrendering up his original leaſe, deſtroy the under-leaſe for ten years, as it would be manifeſtly unjuſt that he ſhould fruſtrate his own grant.(b) *Touchſt.* 391.

By the Statute of Frauds (29 *Car.* II. *c.* 3.) no ſuch term (except it does not exceed three years from the making of it, and whereon the rent reſerved ſhall amount to two-thirds, at leaſt, of the full improved annual value of the thing demiſed), ſhall be created, aſsigned, granted, or ſurrendered, unleſs by deed or note in writing, ſigned by the party or his agent, authorized by writing, or by act or operation of law.

An eſtate for years may be *deviſed*, or limited *by way of truſt*, to one for life; and, after his deceaſe, to another; or to a perſon *and the heirs of his body*:(c) but the *Harg.* n. (5.) to *Co. Litt.* 20. a. 2 *Fearne*, 144. &c.

perſon taking the preceding limitation for years or life cannot defeat the limitation over; while the whole property in the term will veſt abſolutely in the perſon who takes under that limitation which, if it were of freehold property, would give an expreſs eſtate tail, without any act done by him, and the limitations over will be effectually defeated.

1 *Durnf. & Eaſt.* 596, Doe & Lyde. 2 *Fearne*, 231, &c.

But no limitations are allowed of terms of years which would render them unalienable beyond a life or lives in being, and twenty-one years afterwards.

CHAP.

and on his death it will vest in the person who is to take under the limitations over.

10 Co. 6 Co. } The Person claiming under the limitation over may release to the Quasi Tenant for life, but he cannot (during the continuance of the life interest) assign to a Stranger or surr. to the rev. ~~his int.~~ His Int. during the tenancy for life partakes more of the nature of an interesse Termini or rather an equitable right than any other species of Int.

(b) This is true if the limitations over are to take effect only on an indefinite failure of Issue; but a provision may be introduced to determine the int. of the Quasi tenant in tail by his death under 21 &c. and in that event the limitations over may be good. Preston's Tracts 74.

(a) when the immediate freehold is to be — conveyed and the owner is seised of an estate which confers a right to the possession immediately.

(b) But when a liniton is made for years with rem. over for an estate of freehold and livery of seisin is necessary to perfect the assurance livery must be made to the Lessee for Years as a means to give perfection to the freestate of freehold

But tho' no livery is made the estate — for years will be good notwithstanding the est of freehold will be void for want of livery.

(c) See next page (c)

CHAP. III.

OF AN ESTATE OF FREEHOLD.

ESTATES *at will* and *for years* are considered by the law as only *chattel* interests. An estate for *one's own life*, or the *life of another person*, or any *greater* estate, is deemed an estate of *freehold*. In the tenant of the *latter* estate the feudal possession or seisin is vested; and the tenants of the *former* are regarded as only the bailiffs or farmers of their respective lessors. Hence *livery of seisin* * ~~must be~~ was given on the creation of an estate of *freehold*, (a) though it ~~cannot~~ could be given on the creation of an estate at will or for years only, (b) as the person intended to hold at will or for years ~~is~~ was not to be put into the *seisin*, (c) ~~which must remain in his lessor;~~ for if livery *had been* given, a *freehold*, of necessity, would have passed at

2 *Bl. Comm.* 143, &c. *Sulliv. Lect.* vi. 1 *Burr.* 107. &c. *Butl.* n. (1) to *Co. Lit.* 266. b.

* The necessity of the actual livery is now frequently obviated by Conveyances under the Stat. of uses see book 2 c 11. 12. c 13

common law*. (a) The tenant for life, or the immediate tenant of the freehold, is to anſwer to the *præcipe* of ſtrangers, and to render to the lord the returns of the feud; and hence it is that an eſtate of freehold (d) was not ſuffered to commence *in futuro*, as there muſt have been ſuch an immediate tenant in actual exiſtence (e) (2)

* But ſince the Statute of Frauds, a freehold cannot paſs without writing. (b)

(1) Or the right under the ſeiſin to be ſuſpended at intervals or to change from perſon to perſon at different periods (ſee eſſay on Contg. ch freehold.

(2). It is impoſſible to put the freehold of lands in abeyance (except as to parſons &c) it muſt always reſide in ſome perſon but in caſes of Conveyces. to Uſes and aſſurances which operate wholly by means of the Statute of uſes without any conveyance to ſerve thoſe uſes, the freehold may be limited with effect to commence in future. In the former caſe it will deſcend to the heir of the teſtor and in the other cases reſults to a remain in the Grantor till it can veſt according to the form of the limitation

CHAP.

(c) When Livery is made to a lessee for years for the purpose of giving effect to an estate of freehold in remr. the livery as to the Lessee for years merely applies to the possion, and as to the tenant for life &c it applies to the seisin so that the seisin passes instantaneously if at all to the tenant for life without ever residing mommentarily in the lessee for years

An Estate at Will can never be the foundation of a remr. c therefore if a grant is made to A at Will, with remrs over, the remrs will be void altho' livery of seisin is made to the lessee at will

(a) There are many cases however in which the Livery will be void. as Livery according to the form and effect of a grant, which limits an estate to commence in future.

(b) In feoffmts Livery of seisin ~~and not the Chart will pass without reciting~~ of feoffmt. is the operative and efficient part of the assurance - for tho' livery the Feoffee has no estate

(d) Except in the grants of corpl. hereditts created de novo.

(e) In preparing recovery deeds a framing an opn of titles depending on recoveries, it is particularly important to ascertain that the immediate freehold was at the time of suffg the recov.r or in the term of wch the recovery was suffd vested in the tenant to the writ of entry (commonly called the Precipe) for unless the tent to the writ of entry had the freehold the recovery will not be a bar to the issue in tail a those in remr. or revr see Smith dem Dormer c Packhurst. 2 Shange 1105 - 2 Atk. rept. 134 Rigot on com Recovs c Cruise on the same.

Many recovs are erroneous in this respect and therefore parter attention should be paid to investigate the title to the freehold.

To the creation or transfer of an Estate of

Freehold

freehold; Livery is necessary only when the grantor has the poſſon, as well as the seisin of a corpl. Hereditt. For incorporeal hereditts may in all cases be transferred or an estate of freehold in corporeal hereditts may be created or transferred by grant &c when the party has merely a remr. a revn

Livery of seisin is necessary only to transfer the seisin in poſſon when there is a common law Conveyance (viz a feoffmt) for the title to the seisin in poſſon may be changed by devise; by bargain and sale; & Covt. to stand seised to an use.

(a) certainly the Law is that one Tenant for life may surr. to another, if the estate of the Tent. for life in remr. or revn. is as to him as large or larger than the estate of the Tent. for life in poſſon. The same Rule applies to Merger; and therefore if a purchase the estate of B, he will hold for both estts: but if B purchase the estate of A., that estate will be extinguished by merger or by Surr. Under these circumstances if he meant to preserve the benefit of the estate of A. he should have that estate assigned or a previous demise for years made to a Trustee.

CHAP. IV.

OF AN ESTATE *POUR AUTRE VIE.*

AN Eſtate *pour autre vie* is an eſtate of *freehold*, though it is the loweſt or leaſt eſtate of freehold which the law acknowledges. An eſtate for the life of *another* is not ſo great as an eſtate for *one's* OWN LIFE. If *A.* have an eſtate for his own life, with remainder to *B.* for the life of *B.* *A.* is capable of taking a ſurrender from *B.*(a) A *præcipe quod reddat* will lie againſt a tenant *pour autre vie*; for he, *being tenant of the freehold*, muſt anſwer to the claims of ſtrangers; and hence it cannot be created to commence *in futuro.*

2 *Bl. Comm.* 120. 258. *Litt.* b. 1. ſ. 56. 57. & *Co. Litt.* 41. b. &c.

Co. Litt. 41. b. 42. a.

This eſtate, being an eſtate of freehold, muſt be created by ſome mode of conveyance which will paſs the freehold in poſſeſsion;

poſſeſsion;(a) and may be transferred, that is, conveyed, during the lives of the *celles que vies*, by the common mode of conveying freeholds.(b) It may alſo be ſurrendered to the immediate reverſioner,(c) though that reverſioner(d) be only tenant for his own life.(e)

If an eſtate for the lives of *A. B.* and *C.* had been conveyed to *D.* without more, and *D.* had died, living *celles que vies*, the perſon who firſt entered(f) might have enjoyed the lands during the lives of *A. B.* and *C.* But now, by the ſtatutes of *Car.* II. and *Geo.* II. *D.* may diſpoſe of the eſtate by his laſt will (to be executed according to the Statute of Frauds,(g) it being an eſtate of freehold), or, if he die inteſtate, it ſhall go to his executors or adminiſtrators, and be diſtributed among the next kin.

29 *Car.* II. *c.* 3. *ſ.* 12. 14 *Geo.* II. *c.* 20.

Carth. 376. Oldham *v.* Pickering. *Butl.* n. to *Co. Litt.* Index, *tit.* Dower.

But though this be an eſtate of freehold, it may be limited to *D.* his *executors and adminiſtrators*, as well as to *D.* and his *heirs*; for the ſucceſſors of *D.* *take as ſpecial occupants*, and not by deſcent. And this mode of limitation is often preferable, as it

(a) as by feoffmt. Bargain and Sale or Covt. to stand seised - or
In Remainder or Reversion - as by bargain and sale; Covt. to stand seised; Lease and Release; or Grant.

(b) namely - As to Ests in possion; by feoffmt. &c as above. and
as to Ests in remr. or revr. by barg.n & Sale as above.

(c) or Remainder Man.

(d) &c.

(e) And tho' Livery was necessary to the creation of an estate for life No Livery is required to it's transr.

(f) (That is) without naming the heirs as special Occupants

(g) who was in possion.

(h) It was doubtful whether an estate pour autre vie, transmissible to Exors may not be devised by a will not attested by 3 Witnesses. Mr. P. thinks it may on the Ground that every disposn of a Testor is binding on the Exor.

(a) either by deed or will.
(b) by a legal or equitable
(c) articles of agreement &c
(d) and it seems probable that the Courts will determine a disposition by will to be effectual to this purpose.

it frequently ſaves the premiſes or eſtate from the inconveniences of a minority.

An eſtate *pour autre vie* may be limited over (a) *by way of remainder*; and, in effect, *be entailed*. But thoſe who have intereſts in the nature of an eſtate tail may bar their iſſue, and all remainders over, by (b) alienation, without fine or recovery, as by leaſe and releaſe, ſurrender, &c. and the having iſſue is not eſſential, as in the caſe of a conditional fee at common law. (d)

Harg. n. (5.) to *Co. Litt.* 20. a. 2 *Fearne*, 309, &c.

Tho' an est. of freehold pan autre vie is h to the heirs there is no estate of Inhance therefore there cannot be any dower a Courtesy of it.

CHAP. V.

OF AN ESTATE FOR LIFE.

Litt. ſ. 56—57. *Co Litt.* 41. b. *2 Bl. Comm.* 120.

BY an eſtate *for life*, generally, is underſtood an eſtate for one's own life, and not for the life of another.(a)

Like that, however, it cannot be made to commence *in futuro*, it being an eſtate *of freehold*; and, for the ſame reaſon, it muſt be created or transferred by livery of ſeiſin, (secundum formam chartæ) leaſe and releaſe, bargain and ſale enrolled, &c. or be ſurrendered to him in reverſion.(f)

(a) Examples of Ests for life are either

1st Conventional as arising by the mere act and agreement of the contracting parties (See Essay on Est. Ch. Est for life)

2d Legal as arising by the mere act and operation of the Law. and these again are divided into Estates

1st. For the lives of several persons.
2. Merely for the life of one person.
3. For the life of one of such persons.
4. For an uncertain and indefinite period which may continue to the end of a life.

and for the distinction between Estates for the life of the Tenant and for the life of another person. See Essay on Est. ch Life.

(b) In Conveyances at Common Law
(d) Or if in reversion or remainder by Grant.
(e) it must.
(f) a remainder.

(a) a hereditament

(b) before entry she has merely a title of dower, after entry she has an estate of freehold.

CHAP. VI.

OF AN ESTATE IN DOWER.

DOWER is an eſtate *for life*, which the law gives the widow in the *third part* of the *lands and tenements*(a) of which the huſband was *ſolely ſeized, at any time during the coverture*, of an eſtate in *fee* or in *tail*, in *poſſeſſion*, and to which eſtate in the lands and tenements *the iſſue of ſuch widow might, by poſsibility, have inherited*.

2 *Bl. Comm.* 129. *Litt. b.* 1. *c.* 5. & the *Commen. Preſt. on Eſt.* c. 7. *p.* 536.

This eſtate, though created by act of law, may be conveyed or prevented by the act of the party.

Before aſsignment and actual entry, the freehold is not in the widow; and, by conſequence, the mode of paſsing her claim differs before and after entry.(b)

Before entry she has only a *right*, which must be conveyed by *release*, and that to the *person in possession of the lands*, as to him only a release of right can be made.—*After* entry, the possession or freehold of her third is in ~~herself~~; ~~and~~, consequently, the proper mode of conveyance *to the person immediately in reversion* will then be *a surrender*; and to *a stranger* it may be conveyed by feoffment, with livery *(secundam formam chartæ)*, lease and release, or bargain and sale enrolled.

1 *Cruise*. 179. 2 *Ibid*. 96. 237. *Pigg. Rec*. 66. 123. 195. *Harg*. N. (C.) to *Co. Litt*. 121. a. *Plowd*. 514. Eare v. Snow.

During the life of her husband the wife may pass, or rather bar, her right to dower, by fine or recovery; which are matters of record, and in the process of which she is secretly examined, to prevent or remove the suspicion of any compulsion in the husband.

And as dower is claimable out of those lands and tenements of which the husband was seized AT ANY TIME DURING THE COVERTURE, the alienation of the husband alone, after marriage, will not bar her claim; and, therefore, it is necessary that care

(a) extinguished. for a right cannot be transferred or conveyed

(b) or in reversion or remainder, and a release to the person in possess^{n} will operate for the benefit of those in remn. or rev^{n}. And the Converse for a right once extinguished cannot be revived; and a release as to one person is a release as to all persons.

(c) A Surr^{r} is not strictly speaking a Conveyce it operates as an extinguishment, not as a transfer, and no assurance is properly denominated a Conveyance unless it creates or passes an estate.

(d) or if it gives a title to a reversion expectant on an estate for years then by grant.

(e) of the freehold e in fee.

(f) and after the title of dowers is attached.

(a) In this respect dower differs from free bench (which is the widows Customary Estate in — copyhold Lands) For the widow will be entitled to freebench of those copyhold lands only of which the husband dies seised; and even an equitable alienation by the husband will defeat the wifes title to Freebench. Hinton v. Hinton 2 Ves Rep.s

(b) Since the case of Radnor v Vandebendy Show Parl: Cases 69. Terms created prior to the commencemt. of the title to dower are frequently relied on (particularly Mortg.e transactions) as a protection against the wife's title to dower. They are no bar to her dower but merely a protection against her deriving any benefit from suing to recover. It seems the term must actually be assigned in trust for the purchaser. See Butl. Coke on Litt. 208 a (1) But this is not clear it is now under discussion in the Ct. of Chancy (A)

(c) and therefore if he dies in the life time of his companion & sells before the plantation duty is severed the wife is not dowable.

(A) In order to make the term a protect.n it is necessary that there should be an actual assignment, for a mere declon will not do, as it will in the case of any other incumbce (Willoughby v Willoughby 1 T rep.ts 763. Maundrell v Maundrell 7 Vesey Jr. 567. & Id. Vol 10. 246.

(B.) To obviate this objection it was at one time

care be taken in conveyances by a married man that the widow be effectually precluded from her dower (if entitled) by her joining in levying a fine, or ſuffering a recovery. (a) (b)

Again; as dower is only claimable in ſuch lands and tenements of which the huſband was *ſolely ſeized* during the coverture, in *fee-ſimple* or *fee-tail in poſſeſſion*, ſeveral modes preſent themſelves by which dower may be prevented or barred.

And, in the firſt place, it is requiſite to dower that the huſband be *ſolely* ſeized; and, therefore, dower is ſometimes barred by conveying the eſtate to *the huſband and another perſon in joint tenancy*; in which caſe, as the huſband was not *ſolely* but *jointly* ſeized, the dower does not attach. (c)

But this mode is very objectionable; for if the ſtranger or truſtee die during the life of the huſband, the huſband will become *ſolely* ſeized, and ſo the end of ſuch conveyance be defeated. and if the Truſtee survive the husband the legal Est. will be outstanding.

The

2 *Brow. C.C.* 630. Curtis v. Curtis.

The next requiſite is that the huſband *be ſeized*; and, conſequently, another mode of preventing dower is by creating *a truſt*; for a court of equity has not ſuffered the widow to claim her dower in a truſt-eſtate.

But this mode is alſo objectional, as it puts the legal freehold out of the huſband.

A third requiſite to dower is that the huſband muſt be ſeized of an eſtate in *fee-ſimple or fee-tail in* POSSESSION; and, therefore, a third mode is to put *the fee in remainder*; as to the huſband for life, with remainder to another perſon during the life of the huſband, with remainder to the huſband in fee or in tail. In this caſe, the intervening eſtate to the other perſon prevents the remainder over from being executed in poſſeſſion in the huſband; and he is only ſeized in *poſſeſſion* of the eſtate for life.(a)

So if the eſtate be limited to the huſband and a ſtranger for life, in joint tenancy,

hine the practice to convey to the Purchaser and a Trustee and the heirs of the Trustee so as to vest the legal inhance in the Trustee

But this mode was open to objection as on the death of the purchaser, the inhance remained in the trustee, & the concurrence of the trustee or his heir was necessary to perfect the title to a future purchaser &c

(a) But tho' an intervening estate of freehold a of inhance will prevent the attachment of a title of Dower an intervening term of years does not preclude this title Salk. 254. Litre. 719 L.d Raym. 326

And it has been determined that an ——— intervening contingt estate of freehold a of inhance unless it actually vests will not prevent the wife's right of being endowed — (On this point see Cordales Case Cro. Eliz. 317. Co. Litt. 239. (b) n 3. — Essay on Estates. ch Curtesy.

Another form of limon to prevent dower less objectionable than many which were used was a Conveyance to the use of a Trustee during the joint lives of husband & wife Remr to the husband in fee. The only objection to this form was that on a mortgage or sale by the husband during the Coverture the trustees — concurrence was requisite to pass the estate

(a) Under this form of limitation the wife is — never dowable.

There are four limitations or clauses each of which is material.

The first is the power of appointment By means of this power the Purch. may defeat the estate of his Trustee and supersede the necessity of his concurrence in any conveyce

The 2nd is the limon to the purch: for life This gives him the present legal estate, right to the possn, and to the Rents &c

The 3rd is the limon to the Trustee for the life of the purchaser This intervening estate of freehold keeps the purchaser's estate for life distinct from his inhance and this prevents even the attachment of any title of dower.

The 4th is the limon of the fee to the — purch: By this limon, the legal fee is vested in him so that if he dies without making any appointmt the inhance will vest in his — heir, or those to whom he shall devise &c unaffected by any title of Dower in his — Wife and without any estate in his h ce since that estate will determine by the death of the purch:

Thus this form of limon is free from all the objections which have been noticed

Some Gent: relying on the efficacy of a power of appt have limd the lands to such uses as the purch: shall appoint &c in default of appt to him in fee. This form is objectionable. It is clear that the husband is seised of the fee imy and that the wife is dowable of that estate, and it is questionable whether the exercise of the power of appt will defeat the wife's title of dower.

nancy, with remainder to the husband in fee or in tail, the husband shall hold the estate for life in joint tenancy with the stranger, and the remainder will be only executed *sub modo*, and not in possession. But this manner of limiting the estate is objectionable, as before noticed under the first mode, by reason of the possibility of the husband surviving the stranger.

The best way is, therefore, to limit the estate *to such uses as the husband shall appoint*, which gives him the power over the whole fee; so that he may pass it to a purchaser without any fine or concurrence of the wife or others; and the purchaser, on the execution of the power, shall be *in* from the original conveyance, and so paramount the claims of the wife[a]; *and, in default of execution, to the husband for life, with remainder to A. B. his executors and administrators, during the life of the husband*, which will put the limitation over in tail or fee *in remainder*; and by limiting the estate to the *executors and administrators* of *A. B.* it will be more likely to prevent the estate falling into the hands of a minor,

Butl. n. (1.) to Co. Litt. 379. b. 1 Fearne. 509.

in

in case *A. B.* die before the husband; and the estate to *A. B.* being only an estate *pour autre vie*, may (notwithstanding its being a *freehold*) with equal propriety be limited to *his executors and administrators* as to his *heirs*, as they will not take by descent, but as special occupants.(a)

See *ante.* ch. 4. p. 22.

Co. Litt. 36. a. & b. and Notes. 2 *Bl. Comm.* 137. 1 *Atk.* 563. Hervey *v.* Hervey. N. (1.) to *Co. Litt.* 36. b. & the books there referred to. Case of Drury *v.* Drury, 5 *Bro. Parl. Cas.* 570.

A woman may also be precluded from claiming her dower in any lands of which the intended husband shall be seized during the coverture, by accepting a jointure according to the statute of Henry the Eighth. So she shall be barred in equity by the acceptance of other considerations, such as do not fall within that statute, as a yearly sum of money, though not charged on any specific fund.(c)

Butl. n. 1. to *Co. Litt.* 208. a. & additional note.

If there be any existing term which was created before marriage, there shall, in certain cases, be a *cesset executio* during the term.(d)(e)

(d)(e) But it is said that there must be an actual assignment of the term to protect a purchaser against the dower of the widow of the Vendor. — It is said also that a term while ——— outstanding is as much attendant in equity upon dower as upon the remaining interest in the inheritance.

CHAP.

(a) When there is a power of appointment it is of very little consequence whether the estate to the trustee is to him & his h^rs or to him his exrs & since the estate itself may be defeated & overreached by an exercise of the power.

In practice it is not common to require the concurrence of the Trustee, but it is observable that, if instead of appointing, the purchaser conveys without the concurrence of the Trustee there is an intermediate estate in the trustee which as long as it continues will prevent a title of dower in the wife of the Purchaser. I have known instances of this to occur.

(b) On the several circumstances which must concur to render a jointure a legal Bar of dower. See Co Litt ch. Broch. Essay on Ests. ch. Dower.

(c) But if the wife is an infant at the time of the marriage the provn must be such as corresponds with a jointure so as to take effect in point of benefit imm^t on the death of the husband (Carruthers v Carruthers 4 Brown C^c 500)

(d) hence in part the use of attendant terms to protect the inheritance

(e) It must also be observed that as against an heir or devisee, the wife instead of being excluded from the benefit of dower by an attendant term, is entitled to the benefit of the term according to her estate in the lands by reason of her dower.

---

* note by the Editor. As the husband seized of an estate of which the wife would be dowable if she should survive him, cannot destroy her right to dower by his own act; so it seems to follow that according to the doctrine in Mamdrell v Mamdrell, he cannot by his own act cause the term to cease to be attendant

upon dower. If the right of the wife to dower attaches upon the freehold in the life time of the husband, it must surely, according to Saunderell v Saunderell attach also upon the term attendant upon such freehold; as it is laid down in that case that the outstanding term, "is as much attendant upon dower, as the remaining interest in the inheritance, and therefore ought not to be set up by the latter against the former." If the wife therefore cannot be deprived of the dower by the husband alone, it does not appear how she can be deprived by him alone of her right to the attendance of a term which is as much attendant upon her interest as upon his own, nor consequently how an actual assignment of such term can be properly made without her concurrence is to be legally given.

(a) The circumstances which must concur to give a title by the Curtesy. are

1st Marriage
2. A sole and act[l] seisin of the wife of the freehold e inheritance without any intervening a prior estate of freehold or Inheritance.
3 The Birth of a child which may inherit to the estate of which the wife was seised

A The estate by Curtesy becomes inchoate by marriage, and the birth of a child as dower does by marriage alone, and may afterwds be conveyed &c[r]? &c during the wifes life.

CHAP. VII.

OF AN ESTATE BY THE CURTESY. (a)

AN eſtate by the curteſy, like that in dower, ariſes by act of law, and is an eſtate *of freehold*; and, conſequently, as it may be conveyed to a ſtranger for the life of the tenant by the curteſy, it muſt be conveyed by thoſe means which the law appropriates for the transfer of freeholds, as by livery, or under the ſtatute of Uſes. 2 *Bl. Comm.* 126. *Litt.* b. 1. c. 4. & *Co. Litt.* 29. a. to 30. b.

It may alſo be *ſurrendered* to the heir or reverſioner. A

As an huſband ſhall have his curteſy of a truſt, the ſame modes of prevention do not exiſt as exiſt with reſpect to dower. But as he ſhall not have his curteſy of a remainder or reverſion *on a freehold*, nor of

of a freehold in poſſeſsion that is not alſo *of inheritance*, the eſtate by curteſy may be prevented by placing either the freehold in poſſeſsion, or an intermediate eſtate of freehold, or the inheritance, out of the wife.

CHAP.

CHAP. VIII.

OF AN ESTATE TAIL.

WHEN an eſtate is limited to a perſon and *his deſcendants*, it is called an *eſtate tail*, as to a man *or* woman, or to a man *and* woman, and the heirs of *his, her*, or *their body or bodies*.

2 *Bl. Comm.* 110. *Litt.* b. 1. c. 2 *Wright's Ten.* 185. *Sulliv. Lect.* 121. *Watk.* No. lxxix. to *Gilb. Ten.* 418. & 1 *Watk. Cop.* ch. 4. p. 147. *Preſt. on Eſt.* 264.

If it be to a man *or* woman, and the heirs of his or her body, it is an eſtate in tail *general*, as any heir of his or her body may inherit: but if it be to Thomas and the heirs of his body *by his wife Jane*, or to Jane and the heirs of her body *by her huſband Thomas*, or to Thomas *and* Jane and the heirs of *their bodies*, it is an eſtate in *ſpecial* tail; and ſo alſo if it be to the heirs *male* of the body of A. B. As, in the firſt caſe, no heirs of the body of Thomas can inherit but thoſe who are born of Jane; nor, in the ſecond, any heirs of the body

of Jane by any other husband than Thomas; nor, in the third, any heir of the body of Thomas who is not also heir of the body of Jane, nor of Jane who is not also the heir of the body of Thomas; or, in other terms, no heir of the body of Thomas by any other wife, nor of Jane by any other husband, shall succeed.

Hence if it be wished to settle lands so that the entail may not be cut off by the parents, it may sometimes be necessary to limit an estate for life to one parent, and the inheritance to the heirs of the body of the other, as the entail would then be in neither. The first taking only for life, and the other not taking at all; but the heirs being in by purchase. Or if the estate be the husband's, to limit to him for life, with remainder to the wife in tail, as he being tenant for life only, cannot dock the entail, and the wife is prevented from doing so by the statute of *Hen. 7. c. 20**.

* But as husband and wife may *together* bar the entail, this is not always an effectual mode of prevention.

(a) This is not very correctly expressed as it implies in terms that the heir inheritable under this intail must be

1st Heir of the body of Thomas

2nd Heir of the body of Jane.

so that he shall be excluded unless he answers both these descriptions.

All that the law requires is that the heir shall be of the bodies of A & B for the purposes of this intail not that he shall be the heir of the body of A as one distinct qualification and then heir of the body of B as another distinct qualification; for if these qualifications are necessary, the issue of the B. could not inherit as heir, if either A had a son by a former Wife — a B had a son by a former husb.d since such Son of A is (generally speaking) the heir of his body and since such Son of B is (generally speaking) the heir of her Body.

(b) Here also it may be observed that for the purpose of different Ests. Tail diff.t Children of the same person may be the heirs of those intails for instance

The 1st Son of A may be heir to ~~another~~ one intail as under a general intail — a an intail in and by his first Wife

The 2d Son of A. may be heir to another intail as under an intail in A by B. his Wife who is the Mother of this 2d Son

And the same observation applies to diff.t daurs by diff.t women.

This is contrary to the rule of Descents applied to Ests in fee: since Ests to them there can only be one heir a sent. (heir) mak.s in intendment of law only one heir)

(a) of freehold.

(b) not to the heirs of the person to whom the estate of freehold is limited begotten by or on the other. Since the limiton to the heirs would in such case unite with the limiton & give the ancestors an estate of inheritance

And in this case in deeds there must be a limitation of an est. of freehold to trustees &c to support the est. to the heirs which is a contingent rem. But this form of limon should never be resorted to as it suspends the right of alienation under the intail till the death of the parent since no one can till that event be deemed to fill the character of Heir for the rule is "Nemo est Hæres viventis."

But as it is a rule, that "if the an- 1. *Co.* 104. *Watk. Deſc.* 157. "ceſtor, by any gift or conveyance, takes "an eſtate of freehold, and in the ſame 1. *Harg. Law Tr.* 485, 550. "gift or conveyance an eſtate is limited, *Preſt. on the rule in Shelley's caſe.* "either mediately or immediately, to his "or her heirs in fee or in tail, the words "*the heirs*" are words of limitation, and "not words of purchaſe," care muſt be taken, if it be intended that the entail ſhall not veſt in the parents, to limit the eſtates ſo as not to be capable of uniting; as to the parent for *years*, as for ninety-nine years if he ſo long live, which will only give him a *chattel intereſt* that cannot coaleſce with the eſtate limited to his heirs, which is *a freehold*; or to give an *equitable* eſtate[a] only to the parent, and a *legal* one to the heirs; for eſtates muſt be of the ſame nature to be capable of uniting, as both freehold, or both legal: or to confine the particular eſtate to *one* parent, and limit the remainder to the heirs of the body of *both*.[b] And care muſt alſo be taken that *the whole of the particular eſtate be diſpoſed of*, leaſt any eſtate of freehold be capable of *reſulting*

to the anceſtor to whoſe heirs the eſtate is limited.

But the beſt and moſt uſual mode is to limit to the parent or parents for life, with remainder, not to the *heirs* of his, her, or their body or bodies, but to the *ſon* or *ſons* (or *children*) and the heirs of his, her, or their body or bodies, ſo that the ſon, or ſons, or children, ſhall take *as purchaſers*, as perſons *particularly and expreſsly deſignated*, and *not as the heir or heirs* of the parent or parents. But if the ſettlement be made *before* the birth of ſuch children, the remainders limited to them muſt neceſſarily be *contingent ones* till they come *in eſſe*; and conſequently ſubject to deſtruction, or to being defeated by the parents; and hence the utility *of appointing truſtees for preſerving them*. The moſt common mode of limiting theſe remainders to the iſſue, is to *the firſt and other ſons*; but this mode is ſometimes objectionable, as it renders the eldeſt ſon independent on his parents; and it may, therefore, be adviſable to limit the eſtate *to ſuch ſon* of the marriage *as the parents*, or

2. *Bl. Comm.* 171.
1. *Atk.* 581. Hopkins *al.* Dare *v.* Hopkins.
Butl. add. n. to *Co. Litt.* 271. b. and n. (2) to 265, a. & 290. b. (*ſ.* 111.)
1. *Fearne.* (See index tit. Truſtees.)

(a) It requires caution as a general plan whether the power of appointment should be confided to the surviving parent It certainly is a means of rendering children attentive even dutiful to a good and a sensible parent, but like many other good provisions this power is frequently abused, is the cause of art in some children partiality in some parents; and is frequently (tho' it cannot be done strictly and legally) the foundation of a Bargain between a parent and a Child, and when an estate proceeds from the husband it is seldom right to give the wife (tho' the Surviving) a power of appointment over the whole property It is better to give her a power of appointing a particular Sum so as to reward those who shall deserve it.

(b) The form of limitation always depends on the intention and the situation and view of the parties. The preference of the 1st Son seems to have arisen from the circumstance, that Settlements were merely to carry on the intail as near as might be in the line of common Law descent and yet avoid those burdens which in the feudal law were the consequence of descent formerly the property belonged principally to the great men of the realm, the nobles &c and with them it was always an object to keep the dignity and the estate in the same line, so it is at this day with Noblemen and other titled persons a settlement of their property scarcely ever admits, with propriety of a departure from the ordinary mode of settlement, on the first & other Sons successively, tho the circumstances of the Settlor may require different modifications for raising portions for younger Children annuities Jointure for Wife &c

(c) determinable

(d) but if no fine is levied the issue in tail may avoid the ~~estate~~ alienation of their ancestor

(e) the immediate reversion or remainder in fee

(f) but when the tenant in tail has the reversion by descent or the title to it is different from the title to the Estate tail it is always advisable to suffer a recovery and even dangerous to levy a fine - P. Tracts

or ſurvivor of them, ſhall, by deed or will, appoint, and to the heirs of his body; and in default of ſuch appointment, to the firſt and other ſons, &c. in the uſual manner.

An eſtate tail cannot be transferred to another; but, as the tenant in tail has a fee (though reſtricted) in him, he may convey a baſe fee to another, by leaſe and releaſe, bargain and ſale enrolled, or by fine; that is, if he makes ſuch conveyance to A. and his heirs, A. and his heirs ſhall have a fee ſimple qualified, that is, ſo long as the heirs of the tenant in tail continue. And if the tenant in tail have alſo the reverſion in himſelf, he may convey an abſolute fee to another, or gain an abſolute fee in himſelf, by levying a fine; for the fine paſſes the reverſion, which is an abſolute fee, as well as the baſe fee; and when both fees are fixed in the ſame perſon, the baſe fee merges in the abſolute one, ſo that the abſolute, or reverſionary fee comes into poſſeſſion.

No. 1. to *Co. Litt.* 331. a & the books there cited. Of *Diſcontinuance*, ſee *n.* (1.) to *Co. Litt.* 326, b. & (1) (2) to 327, a. 3. *Bl. Comm.* 171, 191. *Litt.* b. 3. c. 11. & *Co. Litt.* 325. *Gilb. Ten.* 107.

1. *Cru.* 274. But as the tenant in tail (while tenant in tail) *may charge the reverſion*, and as the fine when levied brings *the reverſion into poſſeſſion*, it is frequently prudent,
2. *Cru.* 284. and, indeed, neceſſary, in order to gain a good title, to ſuffer a recovery, as a fine lets in the charges of the tenant in tail, and a recovery gives a clear and new fee *.

2. *Bl. Comm.* 359. *Bigg.* 108, ch. 5. 2. *Cru.* 218. Hence then is a recovery ſuffered by the tenant in tail, in moſt caſes, the beſt and moſt effectual bar †; and this ſhould be ſuffered with (at leaſt) *a double* voucher, for if ſuffered with *a ſingle one*, it only bars the eſtate *of which the tenant in tail is*

---

* But a recovery will let in the charges of *the perſon ſuffering it*, though not thoſe of his anceſtors. See 2 *Cru.* 284, 8, & *poſt. B.* 2. *C.* 16.

† In ſome caſes indeed a fine is a more effectual bar than a recovery; as the former is declared an eſtoppel or bar by the *Stat.* 32. *Hen.* 8. while it would be at leaſt doubtful whether the iſſue would be eſtopped merely by the vouching of the anceſtor, who had no eſtate in the lands at the time to paſs. *Poſt.* B. 2, C. 15. & C. 16.

actually

(a) or rather will not disturt or defeat them on the contrary the charges will attach to the est. tail as expanded into an estate in fee - Capells Ca - 1 Co. 54

(b) Provided the recovery is regular in other respects - there is no instance in which the Voucher of a person who has a vested Estate tail a even the right of entry or of action in respect of an estate tail will not bar the estate tail and the remainders & respect. thereon; But a recovery by Tenant of a contingt. estate tail tho' it will bind him by estoppel will not bind his issue or those in reversion or remr. and in this particular there is a diffe. between a fine and a recovery as a fine by Tenant of a contingt. estate tail will bind his issue. ——— Thus suppose A to be Tenant for life with remr. to Trustees to support contingt. remrs with remr. to the Childn of A who shall be living at his death with remr. to A in fee - A and his Children may by a fine make a good title as against themselves & their issue &c. because the fine will extinguish the right of the Children and their issue under the contingt. est. tail; But a recovery by the Childn would not have the same effect, but as there is an estate for supporting contingt. remrs no bar will be effected as to the children unborn or who do not concur in the fine.

And therefore suppose A to be tenant in tail and discontinue and take back an estate tail and suffer a recovery with single Voucher. This recovery will bar the 2d. Est. depending on the title by discontinuance but it will not affect the just and rightful Est. tail and therefore the issue under that intail - altho' also the issue under the 2d. Est. tail may maintain their action. If the recovery had been with double Voucher both Estates tail would have been barred

a) Quere if there is any case which renders it absol[y] necessary that there should be a recovery with noble voucher.

The only case, in which it can be required is where Tenant in tail creates an estate tail, & the right under both estates tail is existing in distinct persons; and even in that case it is said by some Gent. of great eminence that a joint voucher of the several persons will bind e bar both estates tail. Mr. P. thinks it probable that the Courts would determine accordingly; but as there is no authority to warrant that practice, e the old practice was contrary it is more safe to suffer a recovery with noble voucher 1st voucht the owner of the 2nd Estate tail and then the owner of the 1st Est: tail. and vouching over. [A vide Doe v Nelson - 2 Taunt. 89 - decreed that a joint Voucher is always sufficient.]

b) and tho' the issue in one degree may be barred by having assetts, unless they devolve to the issue in the next degree &c will not be any bar to them.

c) and therefore as the warranty may descend to a person who is not the heir & the title to the rem. to another person there will when that event takes place be no bar by reason of the warranty to the title of those in remainder or reversion.

d) To distinguish e elucidate the difference between lineal & collateral warranty -

A Tenant in tail discontinues with warranty leaving B. C. & D his Sons - This warranty is lineal to all the Children and will not bind without assetts. cont. in next page ff.

Note. Though the issue in tail are barred by the fine of their ancestor they may after the death of Tenant in tail bar the rem. or rev. by being vouched in a recovery duly suffered - Fearnes. Posthum. Works 442

actually ſeized at the time; but if with a double or treble (a) voucher it will bar every other intereſt he may have in the premiſes; as will appear under the head of RECOVERY.

A tenant in tail in poſſeſſion may alſo, in ſome inſtances, bar both his own iſſue and thoſe in remainder, by annexing a *warranty* to his grant, as the warranty will deſcend to his heirs, and, if accompanied with aſſets, will bar his own iſſue, and without aſſets will bar ſuch of his heirs as may be in remainder or reverſion. But the propriety of this mode depends upon much nice matter, and ſhould be had recourſe to with much caution; for ſhould *no aſſets actually deſcend to the iſſue*, (b) they will not be barred, nor will the remainder-man or reverſioner, *unleſs he be alſo the heir of the warrantor*; for, unleſs he be *the heir* of the warrantor, he will not be ſubject to the warranty. (c)

See 2. *Burr.* 1072, &c.

2. *Bl. Comm.* 303.

Gilb. Ten. 133, & *Wank.* n. liv. &c. p. 400, &c.

The warranty deſcending on the iſſue is a *lineal* warranty, (d) as the heir claims *through the warrantor*; and lineal warranty

is no bar without assets actually descending. But the warranty descending on those in remainder or reversion is *collateral*, as they do *not claim through the warrantor, but immediately from the donor*; and *collateral* warranty will bar without assets.

No. (1) to Co. Litt. 379. b. And so established is the power of the tenant in tail to destroy the entail and alien by fine or recovery, that no condition restrictive of such power is permitted to take effect. (a)

And note, that express power is given by statute to Commissioners of Bankrupt to convey lands entailed of the Bankrupt, by bargain and sale enrolled within 6 — Months. (6)

(6) but as to the other real estate of the Bankrupt there is no defeasible time within which the bargain and sale must necessarily be enrolled, but till enrolment the bargainee of sale has not any estate

CHAP.

*
Releases with warranty & dies without issue. On his death this warranty descends on B.

It is collateral as to B.

Lineal as to D

If B Nothaving assets from his father claimed in the life time of C there would not be any impediment to his recovering because at that time the warranty of C had not descended on him and the warranty of A was lineal and there was no assets.

If he claimed after the death of C. then as the collateral warranty had descended on him the warranty would be an impediment to him as the law would presume that he had or would have assets from C. by descent

The same observation applies to the issue of B. and if B die without issue, then D would be the heir of C. and as to him the warranty of C would be lineal and no bar without assets.

A Title depends merely on a Warranty is not a marketable title. The warranty does not give a right. It is to be used merely as a bar to the right of a particular person particularly circumstanced.

(a) The power of a Tenant in tail to alien so as he does not discontinue cannot be restrained by Condition Limitn Custom, Recog.ce or Coot. Co. Litt. Butl. Notes 379 B K.

(b) See the Words of the Statute. It has been doubted whether the bargain & sale will have the same operation as a Recovery unless the ownership of the Bankrupt is such as would enable him to suffer a recovery

(a) Every fee which is not simple is base Estates in fee are most correctly divided into

1 Fees simple
2 Fees ~~conditional~~ determinable
3 Fees qualified
4 Fees conditional
5 Fees tail.

Instances of these estates and an explan^n of their seve. qualities will be found in essay — on estates — and in Coke upon Littleton & Blackstones Commentaries

1 It is not correct to call a fee tail a base fee because a base fee is an estate having the same descendible qualities as a fee simple with the alloy of some collateral restric^n whereas an estate tail has no other — restriction than what arises out of its peculiar descendible quality

2 This is more correctly to be considered as a fee determinable

1 An estate to be defeated not determined upon a given event is an estate on condition See essay on estates for the difference — between a limitation which causes the determination of an estate and a —— condition which defeats an estate.

2 This is a determinable fee.

1 And having once ceased, it cannot revive by a resumption of the tenancy.

CHAP. IX.

OF AN ESTATE IN FEE SIMPLE.

AN Eſtate in fee ſimple is either *abſolute*, or *qualified* or *baſe*.[a] An eſtate in fee *abſolute* is an eſtate limited to a perſon and his heirs, general or indefinite. It is not confined to any particular line or ſpecies of heirs, but is limited to the heirs generally; and it is the higheſt eſtate which the law acknowledges.

2. *Bl. Comm.* 104. *Litt.* b. 1. *c.* 1. *Wright, Ten.* 146. *Preſt. Eſt.* ch. 2.

An eſtate in fee *qualified* or *baſe*, is an eſtate to A. and his heirs *'till a certain event happen*,[b] or *to be defeated if ſuch an event occur*: as to A. and his heirs tenants of the manor of Dale.[c] Here ſo ſoon as A. or his heirs ceaſe to be tenants of that manor the eſtate will ceaſe.[d]

The eſtate in fee ſimple abſolute may be conveyed *ad infinitum*; but it being an

an eſtate of freehold in poſſeſsion (for we are not here to ſpeak of reverſions) the freehold muſt actually paſs; as by feoffment, leaſe and releaſe, bargain and ſale enrolled, &c.

An eſtate in fee qualified or baſe may alſo be transferred by the ſame means, ſubject to the qualifications: but it cannot be conveyed diſcharged of ſuch qualification, unleſs by wrong, as by a feoffment in fee abſolute, which would gain a fee abſolute by diſſeiſin*, and turn the reverſion (if we may ſo call it) to a right, and which right would be barred by a fine levied by the feoffee, unleſs the perſon having ſuch right claim within the time allowed by the ſtatute of *Hen.* 8.

A baſe or qualified fee may by poſsibility continue for ever; and the common law

---

* An eſtate gained by wrong is always a *quaſi* fee: as the law cannot take notice of a wrong, it cannot of conſequence ſet any limits to that wrong. See *Hob.* 323.

does

(a) even on the grant of a reversion the freehold — cannot be limited to commence at a future day or on an event. [Gilbert on Ests. ch freehold].

(b) a bargain and sale and covt. to stand seised may limit an estate of freehold to commence in futuro and in the mean time the freehold will remain in the bargainor a covenantor; & when the bargain & sale & covt. can operate, it will give an estate by springing use [See Gilbert on Ests ch freehold]

(c) The whole of this proposition is questionable I am not aware of any possible means by which the owner of a determinable or qualified fee can by his own act convert that estate into a feesimple As I understand the law, every species of conveyance proceeding from him will operate merely on his ownership. This in point of form he conveys to another and his heirs for ever that conveyance will give a determinable fee of the same extent only as the fee which is in the conveying party. In short it will give that identical estate, but if it is admitted that if the owner of a base fee be dispeised, the disseisor will acquire a new feesimple depending on a new title; and if he levied a fine he might bar 1st the owner of a determinable fee and 2.dly the persons who have the possibility of reversion; but agst. the persons entitled to the possibility of reversion no claim under the fine would not begin to run, till the time the determinable fee was expired It is admitted that a tenant for life may by making a feoffment in fee gain a new title by wrong a disposession; & a tenant in tail in possession may discontinue, and the discontinuee will have a feesimple arising from the discontinuance.

But the alienee of a tenant in tail cannot discontinue. There is no means by which he can change the estate of the title. All conveyances from him must depend upon his ownership — See Seymours case 10 Co 98.

(a) "after and expectant on the determinon" of.

(b) and by the rules of the common law a limitation which is to take effect in abridgemt. or defeazance of another estate was void [Margt Rodgers case 9 Co]

(c) by way of substitution or alternative for another fee

(d) but even in wills and Conveyces to uses a fee limited to commence on the regular and proper determn of a determinable or qualified fee would be void except in the case mentd in page 56 post, and in Fearne page 342 but vide observns on that case.

does not permit any remainder to be limited on a fee either abſolute or baſe.(b) A fee may, indeed, be limited on a fee by way of *executory deviſe*, or of *ſhifting uſe*;(a) of which limitations we ſhall ſpeak in ſubſequent chapters.

CHAP.

CHAP. X.

OF AN ESTATE IN PARCENARY.

2. *Bl. Comm.* 187, 323. *Litt.* b. 3, c. 1, & the *Comment.* And see *Comyns' Dig.* tit. Parceners, as to the general law on this subject. * *Gilb. Ten.* 72—3. † *Touchſt.* 14. 1 *Cru.* 104.

COPARENCERS always take by deſcent; and, as they compoſe but one heir, they have, as to ſome purpoſes, but one freehold (a); but, as to others, ſeveral; (b) hence they may convey *to each other*, either by releaſe, by feoffment*, or fine †. (c)

As *to ſtrangers*, they muſt convey their reſpective portions or ſhares by the ſeveral modes of conveyance which paſs the freehold; as by fine, recovery, feoffment, leaſe and releaſe, or bargain and ſale enrolled; or they may covenant to ſtand ſeized.

Touchſt. 292. But they cannot exchange with each other 'till partition.

If

(d) and on a partition by them, they may take particular pcls of the Land in severalty with. making any Conveyance or Release. Sic otherwise of Joint tenants & Tenants in common.

To make a partition betw. them there must be a Conveyance or as to Joint tenants at least a release.

(b) Therefore a release of Right to one of several Coparceners is a release to all. The same observation applies to Joint tens but Tenants in common have several freeholds & for want of connexion & privity of tenure, a release to one can't be taken advantage of by the others

(c) Therefore the wife of each Coparcener is dowable, & the husband of each Coparcener may have Curtesy.

If there be two parceners, and they make partition by consent, they may release to each other their respective moieties, and there will be no necessity for a lease for a year ~~(or bargain~~ and sale), as the possession at the time of partition would be in each.

The title by parcenary determines by alienation.

CHAP.

CHAP. XI.

OF AN ESTATE IN JOINT-TENANCY.

2. *Bl. Comm.* 179. *Litt.* b. 3. c. 5. and the *Comment.*

JOINT-TENANTS always take *by purchase*; and the proper and beſt mode of creating an eſtate in joint-tenancy is to limit "to A. B. and C. D. and their aſſigns," if it be an eſtate for life; or "to A. B. and C. D. and their heirs," if in fee. The limitation ſometimes made "to A. B. and C. D. and *the ſurvivors of them, and the heirs of ſuch ſurvivors*," is objectionable, as it has been ſuppoſed to give a contingent remainder to the ſurvivor; for, though the propriety of ſuch a ſuppoſition may be queſtionable, yet it would be prudent to avoid the doubt.

Butl. (1) to *Co. Litt.* 191, a. 1 *Fearne*, 283, &c.

But in the creation of a joint-tenancy it is not only neceſſary that the eſtate to the ſeveral perſons *be limited by the ſame deed*,

(a) of Inheritance under Estate tail, there cannot be any joint-tenancy, unless the Donees may lawfully intermarry; & therefore if a gift be made to 2 Brothers or 2 Sisters, or a Brother and Sister, & the heirs of their Bodies, they will have the freehold in Joint-tenancy, but each of them will have a several inheritance in tail.

(b) and necessarily have equal Shares; while Tenants in common & Coparceners claiming under ancestors in diff.t degrees may have unequal Shares

(c) adding such words as shall be necessary to shew the duration of the Estate.

(d) So that the fee is not vested in him to convey but descends to the heir or results to or remains in the former owner till it can vest. But a limitation to two & the Survivor of them for their lives & the life of the Survivor of them does not give a contingent interest because the words express nothing more than is implied by law & expressio eorum quae tacite insunt nihil operatur" (A X

A X Query. How this maxim applies more to the one case than the other? It seems probable that the limitation of the Fee observed upon will be held not to create a contingent remainder. See Goodright's Lessee Layman referred to by Fearne

(a) In conveyances taking effect by the rules of the Common Law.

(b) and not being husband & wife. Roe & Wiantley 1 Term Repts. 633.

(c) or by devise

(d) I donot know that this is the reason & it is observable that all the estate vests in one of the persons till the other is — capable.

(e) altho' he survives; for till he has survived he has no devisable interest. After he has survived, he has a several seizin, and is competent then, in point of ownership, to make an effectual will. As owner of an estate in Joint tenancy, he may acquire a power of alienation by will by severing the Jointtenancy and this — should be done as a preliminary step before any attempt is made to devise.

deed, but the eſtate in them muſt *veſt at one and the ſame time*; for if an eſtate be limited to A. for life, with remainder to the heirs of B. and C. (B. and C. being ſuppoſed to be living,) and B. die *during the particular eſtate*, when one moiety would veſt in *his* heirs, and afterwards C. die, *in the lifetime of A.* when the other moiety would veſt in *his* heirs, the heirs of B. and C. would take in common.

See *Co. Litt.* 188. a. & n. (13.) & 1 *Fearne*, 460, &c. (4th ed.) 239. (3d ed.)

But if the eſtate be limited *by way of uſe* it would be otherwiſe; as the eſtate would be in the truſtee *till* the uſes ariſe; and *as* they ariſe the *ceſtui que uſe* ſhall be in by the original feoffment or deed.

As joint-tenants are ſeized *per mie et per tout* they cannot *grant* (*a*), nor *bargain and ſell* (*a*), nor *ſurrender* (*b*), nor *deviſe* (*c*), to *each other*, nor can they *exchange* (*d*) *with each other*, nor can one of them *enfeoff his companion* (*e*).

(*a*) 1 *Vent.* 78. *Cro. Jac.* 696. (*b*) *Perk.* S. 586, 7. *Touchſt.* 303. (*c*) *Powell on Dev.* 174, &c. (*d*) *Touchſt.* 292. (*e*) *Gilb. Ten.* 73—4.

But each may ſever the tenancy at his pleaſure by granting his portion over to a ſtranger, either to the uſe of ſuch ſtranger

or

or in trust for himself, by the usual mode of conveying a freehold, or compel a partition,(a) by statute; or one may *release to his companion.*(b)

But joint-tenants may, either severally or together, *exchange with a stranger*, or *surrender to the immediate reversioner.*

The right of survivorship or jus accrescendi is the consequence of joint tenancy.

a joint tenancy when it ceases necessarily becomes a sole or several tenancy or a joint tenancy under a new title.

CHAP.

(a) And the Joint tenancy may be suspended without being severed; & if the suspension during the life of both the Joint tenan the Joint tenancy will be revived.

A Grant for life, a intaile by a Joint in fee only suspends the Joint tenancy, b a lease for years neither severs or susp a Joint-tenancy of the freehold.

(b) It is very common for Joint tenants to convey each other by Lease and Release and tho lease is not necessary when it is clear tha the Joint-tenancy exists, yet it is proper way of caution to use the lease, as well the Release unless the existence of the Joint tenancy is indisputable./

(a) or by one title and distinct rights;
and a title to a Tenancy in common may —
depend on
1 Descent (from a Tenant in common)
2 Purchase.
3 Prescription.
When the title by Joint tenancy ceases by —
alienation of one of the Tenants it becomes a
Tenancy in Common.

(b) This mode is seldom resorted to unless the
grantees are to have unequal shares, & then a
better mode cannot be adopted.

(c) In Wills very slight expressions are allowed
to be sufficient to sever the tenancy See.
Com. Dig.t Devise
and the law even makes a distinction betn
Conveyances at the common Law and Limitations
of use. For in the latter the words "equally
to be divided" will be sufficient to sever
the Tenancy. Rigden v Vallier. 2 Ves. 252.
though these words could not be —
effectual for that purpose in conveyances
at the Common Law a Surrenders of
Copyholds
In practice it is always right to use
the words "Tenants in Common."

CHAP. XII.

OF A TENANCY IN COMMON.

TENANTS in common take alſo *by purchaſe*, but hold by diſtinct titles,(a) and have *ſeparate freeholds*, being not ſeized *per mie & per tout*, as joint-tenants are: and the beſt way to create a tenancy in common is either to limit one moiety of the premiſes expreſsly to one, and the other moiety to the other,(b) or to uſe the words "to hold as tenants in common and not as joint-tenants;" as the law may otherwiſe conſtrue it a joint eſtate.(c) 2. Bl. Comm. 191. Litt. b. 3. c. 4. and the Comment.

As the poſſeſsion of tenants in common is undivided 'till partition, they *cannot exchange with each other*, though they *may* exchange, either together or ſeparately, *with a ſtranger*.

Gilb. Ten. 74. But as the ſeiſin of each is diſtinct, and their eſtates ſeveral, one may *enfeoff* the other; or, if the other have a greater eſtate, *ſurrender to him*.(a) So one may *deviſe* his part to the other:(b) but one cannot *release* to his companion, as ſuch.(c)

Tenants in common may transfer their reſpective ſhares *to ſtrangers* by the uſual modes of conveying freehold property; and they may compel a partition among themſelves.(d)

CHAP.

(a) In reun. a revn

(b) For to this purpose one is the owner of a partla estate with reun. a revn to the other

(c) a to any other person

(d) because their estates are several.

(e) But such partition will remain in force one during the continuance of both their estates; for if a partition is made at the suit of a Tent for life a on a suit against him, the partition will cease on his death a the determination of his estate.

In order therefore to effect a partition in fee when there are partlar Estates the Genl. Remedy is a bill in equity which will bind those in revn a reun: as well as the partlar Tenants; but to complete the legal estates there must be a conveyance. When there are particular Estates with a strict Settlement and some of the parties are infants; and all the parties are desirous of having a partition, the ordinary & indeed only effective mode of proceeding is by a Bill in Parliamt.

(a) to take effect on the determ^n of that estate.

CHAP. XIII.

OF A REMAINDER.

A Remainder is that portion of intereſt which, on the creation of a particular eſtate, *is limited over to another.* (a) 2 *Bl. Comm.* 164. 1 Fearne.

Remainders are either *veſted* or *contingent:* a *veſted* remainder is that *which is capable of being received in poſſeſſion ſhould the particular eſtate happen to determine*; as to A. for life, remainder to B. and his heirs: here, as B. is in exiſtence, he is capable (or his heirs if he die) of taking the poſſeſſion whenever A's death may occur. See 3. *Atk.* 138, &c.

A *contingent remainder* is when *the particular eſtate may happen to determine before the perſon to whom the remainder is limited can take the poſſeſſion*; as to A. for life,

with remainder to the right heirs of B. Now, during B.'s life the remainder *is contingent*, as he cannot have an heir till his death; and, therefore, ſhould A. die before B. there could be no one to take the poſſeſsion.(a)

In the creation of remainders the following rules muſt be obſerved:

1ſt, There muſt be a preſent, or particular, eſtate created, which, if the remainder be a *veſted* one, muſt be, at leaſt, *for years*;(b) or, if the remainder be *contingent*, muſt be an *eſtate of freehold*, as a freehold cannot commence *in futuro* by the common law.(c)

2dly, The particular eſtate and the remainders muſt be created *by the ſame deed*.(d)(e)

3dly, The remainder muſt veſt in the grantee, during the particular eſtate, or the very inſtant it determines.(f)(g)

4thly,

(a) But if there are several particular estates it is sufficient that any one of them continues till the rem: vests.

(b) For an estate at Will cannot be the groundwork a rem:

(c) But in limitons by Will & limitons of use, the freehold may be limited to commence in future and after the particular estate vests, by executory devise a springing use, subsequent limitons will operate as and be deemed rem:s

(d) or it should seem by 2 deeds

(e) or Will-but for this purpose a will and codicil are parts of the same instrument.

(f) And therefore if at the common law an estate is limited to A for life & after the death of A and one day after then to B this 2nd limiton will be void; because on account of the interval between the determn of the 1st estate & the commencem: of the 2d: Estate, the 2d: Estate cannot take effect immediately on the determn of the 1st Estate. but the 2nd Limitation may operate in a Will as an executory devise & in a conveyance to uses as a springing use.

(g) In the books frequent mention is made of cont: rem:s - Rem:s of this description are necessarily either vested or contingent. For the nature & explanation of Rem:s of this description. See 1st Tracts.

(a) There is nothing in this case to warrant the conclusion of the text.

(b) A remr. cannot be limited on an event which is an illegal act a to defeat a particular Estate.

(c) On this subject see Sir Hugh Chomley's case. 2 Co: 52 b & 1 Jeanne 376 [Bull. Ed: 259]

On a review of the expressions in the books it will be collected that the examples do not warrant any other conclusion than that the shall be limited to a person who has or may have the capacity of taking; and that in all the instances given of the Potentia remota, the remr. failed because it was limited to a person a Corporation as in being, while in fact there was no such person a no such Corporation; & from the reasoning in Chomley's case, it is evident that a remr. to such Son of J. S as shall be called George a to such Corporation as shall be incorporated by the name of _____ will be good, if such Son is born and named, or such Corporon is incorporated before the determination of the particular estate.

4thly, And, if the remainder be contingent, it muſt be limited to ſome one that may, by common poſsibility, or *potentia propinqua*, be *in eſse* at or before the determination of the particular eſtate. 2 *Hen. Blackſt.* 358. Proctor v. Biſhop of Bath and Wells, & *al.*

By the feudal law the freehold could not be vacant, or, as it was termed, *in abeyance*. There muſt have been a tenant to fulfil the feudal duties or returns, and againſt whom the rights of others might be maintained.

If the tenancy once became vacant, though but for an inſtant, the lord was warranted in entering on the lands, as the conſideration on the part of the tenant had ceaſed; and, conſequently, as no returns were made, there being no one to render the ſervices of the feud, the lord was entitled to reſume it. The tenant can only ſubject his own eſtate to his own limitations; and, therefore, the moment that eſtate ended, by the ceſſion of the tenancy, all limitations of that eſtate were alſo at an end.

The lord on the eſcheat is in paramount the tenant; he is in of an eſtate from which the tenant's was originally derived.

Hence then the neceſsity of an immediate eſtate of freehold, or of a freehold in poſſeſsion, being veſted in ſome perſon actually in exiſtence who may fulfil the duties of the feud, and who may anſwer to the *præcipe* of ſtrangers; and hence the neceſsity alſo of the remainder taking effect during the exiſtence of ſuch particular eſtate, or *eo inſtanti* that it determine; as a limitation of an eſtate cannot take place when that eſtate itſelf is no more.

Co. Litt. 270. a. n. (3) 271. b. n. (1). *Sand. on Uſes.* 332, 455.

A *veſted* remainder may be conveyed to another by fine, by grant, by leaſe and releaſe, by bargain and ſale enrolled; or the remainder-man may covenant to ſtand ſeized. But it cannot be granted to commence *in futuro*. And, as the freehold is in the particular tenant, ~~a remainder cannot be the ſubject of a *feoffment*; for a feoffment operates on the poſſeſsion which~~ the remainder-

See *Poſt.* b. 2. c. 1. of a Feoffment.

(a) And if it is a particular estate, it may be surrendered, a it may be released to the owner of the particular estate by way of enlargement of that estate

(b) tho' it is expectant on an estate of freeh: Epay on Estates ch. freehold.

and if the Tenant for life, with the tenant of the rem: in fee join in a Feoffment without Deed, it will operate as the Surr: of the Tenant for life & the feoffm: of him in rem:.

But if they join in a feoffm: by deed then as the deed may operate on the rem: so as to save the same the assurance will be deemed the Feoffm: of the Tenant for life & the grant of him in rem: Freports ca 6 C. 15. 1. Co: 77. in Bredons case. It may be suffered by the Tenant of a Rem: but to the validity of a Recovery, it is necessary that he should obtain the concurrence of the Tenant of the immediate Freehold.

A Recovery by the Owner of a remote Estate Tail with the concurrence of the Owner of the immediate freehold will bar that Estate Tail & all rem: &c: expectant thereupon.

But if there is any intermediate Estate Tail, a Recovery by the owner of that estate will bar the estate acquired under the 1st Recov:

namely the 1st estate of freehold
a bound.
on a demise by Indre.
or as against the party himself & his heirs — claiming in fee, it may be released by deed; — but when there is a Contingt Est. Tail, & the — contingt Est: is vested in a Feme Covert, then & then only a fine is necessary; or at least in the case — of a Feme Covert she must come in on the vouchee of a Common Recovery & it must be remembered that a Contingt Est: Tail cannot (as against the issue & those in rem: & reov:) be barred or extinguished by a common Recovery.
not being intailed.

This branch of the sentence had better be omitted -

Executory Estates as contingent rems: Ests by executory devise, springing uses &c are not alienable at common law.

They are descendible, devisable unless an Est: Tail, or assignable in equity, as ag:t the party his gen: heirs may be released or bound by estoppel.

der-man has not to convey.(a) For the same reason a *recovery* cannot be suffered of a remainder,(b) as the *præcipe* can only be brought against *the tenant of the freehold in possession.*(c) But, if a *præcipe* be brought against the tenant in possession, and the remainder-man be vouched and enter into the warranty, he shall be bound.

See *Post.* b. 2. Of a Recovery.

A *contingent* remainder may be barred *by estoppel* by matter of record, as a fine or recovery;(d) and if the contingent remainder(e) is such as to be descendible to the heirs of the person to whom limited, if he die before the contingency happen,(f) it may be *devised*, or *passed in equity:* but not otherwise. And it is a general rule that whatever Interest not being a mere right a Title is devisable.(g)

1 *Fearne.* 535, &c. *Sand.* 335.

Contingent remainders may be destroyed, and prevented from taking effect, by destroying the particular estate by which they were supported;(a) and, therefore, it is frequently necessary to limit the legal(b) estate to trustees for the purpose of preserving them.

See *Ante.* c. 8. p. 34.

(a) By tortious alienation
Surrender
Merger
Ceasers which kill entry.
Release of Right of entry.
(b) an estate of freehold.

1 *Fearne*, 49. 2 *J. Bl. Rep.* 687. Wills & Palmer.

If it be intended in a ſettlement to prevent the parent, from whom the lands move, from defeating a remainder limited to his heirs general or ſpecial,—care muſt be taken that no particular eſtate be limited, or be capable of reſulting, to ſuch parent; as the eſtates would, in ſuch caſe, unite, and the parent have an eſtate in fee or in tail in himſelf.

Rule in Kelly's case

It is still more advisable to limit the estate to the 1st and other Sons &c

CHAP.

* From over leaf. post) a any other estate and upon some contingency, a particular estate is introduced to take place in derogation of the estate of inheritance and to a partial tho' not total exclusion of the same

Also a fifth sort of Executory devises of Chattels real, & personal property: For instance where there is a complete disposition of the term & property & there is a substitution of another person totally in some event which is made a Condition to the determination of the 1st. devise.

(B) And a limiton originally framed as an executory devise may eventually take effect by the rules of the comm: Law: As where the devise is to ct. from and after next Christmas or the marriage of B. determines happens & in the other instance the marriage is solemnized in the life time of the testor

It must also be remembered That tho' the freehold is limited, & takes effect by way of Executory Devise, Yet the moment it vests all ulterior limitations expectant thereupon will become rems & if Contingent may be destroyed by the determination of the particular estate

It may further be observed that a remote rem may be vested tho' a prior rem is contingent (A)

But when the freehold is to vest by executory devise all limitons over are necessarily future & capable of effect only by the rules of Law in executory Devises.

(A) Provided of course the prior rem: does not carry the fee for after a limiton of the fee all rems must be contingt

(a) An Estate by executory devise is necessarily such an estate as is limited contrary to the rules of the — common Law. Estates by executory devise have generally been distinguished into 3 kinds.

1 When the devisor departs with the whole fee, and upon — some contingency qualifies that disposn & limits an estate on that contingy.

2. Where the Devisor gives a future estate to arise upon a contingency but does not depart with the fee at present.

3 Where a Term for years a pers.l Estt. is devised to — one for life and after the decease of the Legatee for life or some other contingency or period (not too remote) is given to some Body else.

The two first are peculiarly applicable to freehold estates the latter to chattel Interests

To these may be added

a third sort of executory devise of freehold Estates as — where the Testator gives a future interest of freehold to take effect after and in subordination to a particular Estate of freehold & where the estate of freehold must necessarily determine before the more remote interest can come into its place; so as to leave an intermediate space between the actual determn of one estate and the commencemt of the other as to A for life and after his death and one day after to B.

Also a fourth sort where a particular estate either for life or in tail (with or without a disposn of the fee) is limited by Will; and there is a — devise in the same Will to take effect in — derogation and abridgement of that Estate. As to A for life, or in tail, & that upon some event, that Estate shall cease and the Lands devolve to B.

a fifth sort of executory devise is in real estate in where there is a devise of an estate of inheritance

see over leaf on bea.

CHAP. XIV.

OF AN EXECUTORY DEVISE.

(a)

AN executory deviſe differs from a remainder (among other things) in this, that a remainder *muſt have a particular eſtate to ſupport it*, while it is eſſential to an executory deviſe that *no particular eſtate be in exiſtence*; it being a rule, that that ſhall never be conſtrued an executory deviſe which can be ſupported as a remainder. (b) see over leaf anten. 2 *Bl. Comm.* 172. 2 *Fearne.* 2 *Saund. Rep.* 388. Pureſoy *v.* Rogers.

By executory deviſe a fee or leſs eſtate may be limited after a fee (c) either abſolute or baſe. So that it be to take effect in — proſon within a life or lives in being or within 21 years afterwards. So as to the accumulation of profits Stat 39 Ge 3 cap 98

Or a fee may be limited to commence *in futuro*; as, till ſuch fee take effect, the inhe-

(c) Not after an expectant upon, but by way of derogation of & abridgmt of the fee [see over leaf *]

inheritance ſhall deſcend to the right heirs of the teſtator.(a)

Harg. n. (5.) to *Co. Litt.* 20. a. 2 *Fearne. paſſim.*

Remainders (or at leaſt what we may here call remainders) of chattels, either real or perſonal, may be limited by executory deviſe, ſo they be limited to a perſon or perſons in being, or to veſt within twenty-one years and a few months after the death of a perſon or perſons in being; but if the remainder be ſuch as, if it were of freehold property, would amount to an *expreſs* entail, it ſhall reſt in the perſon in whom it ſo veſts, and be at ſuch perſon's diſpoſal, or to go to his repreſentative on his death.(b)

See *ante.* c. 2. p. 18.

2 *Fearne.* 51. &c.

An executory deviſe cannot be barred or deſtroyed by any act *of the perſon taking the preceding fee*, though by feoffment or matter of record.(c)(d)

2 *Fearne.* 58. &c.

But *the perſon entitled to the executory eſtate* may bar his own claim by *releaſe to the firſt taker in poſſeſſion*; or *aſſign it in equity*

* However there is a class of cases in which the limitation may be good, tho' it is to commence the precise event which may determine the fee previously devised. as to a & his heirs, till h shall be married and after his marriage to B. But still in point of law the executory devise is to commence in derogation and abridgm of the fee, since the determin on by marriag is only a collateral quality of the estate.

(a) But this is to prevent the inconvenience of the abey of the freehold & till the freehold vests the — feesimple, is in the heir.

(b) Unless there is some qualification annexed to the estate to defeat it in a given event consisten with the rule of law against perpetuities. As A and the heirs of his body. * if he shall die — under age and without issue then to B. In this & the like instances, the limiton over will be go if the good which is designated shall arise.

(c) But if an estate tail is subject to be defeated b an executory devise, a Recovery suffered by the Tenant in tail will bar the interest under th executory devise.

(d) A Limiton originally framed as a remain may eventually become a limiton by executory devi as to a for life who dies in the Testors lifetime & after his death to the 1st Son of B. & that Son is not born in the Testors life time.

(a) So he may bind his interest by a Lease made by Indenture and operating as an Estoppel.

(b) When the executory Int: confers a right to an estate, then to bar the issue, there must be a fine.

So if a married woman is entitled to the executory Interest & the same is of a freehold estate, she & her husband must either levy a fine or be vouched in a recovery.

Till an estate by executory devise is vested it cannot be transferred by a common-law conveyance: and all executory Limitations which are to commence on an indefinite failure of issue, & in short on any event which will not necessarily happen — within 21 years [A] and the ulterior period of Gestation after a life or lives in — being, is too remote, and void on that account as tending to a perpetuity.

The only exception is an executory devise to commence in derogation of an estate Tail and then the devise can never be considered too remote as it may be barred by the Tenant in tail.

[A] altho' the period is mentioned as 21 yrs it has never been taken independent of the minority, either of the devisee, or of some other person, and it is doubted whether it could be so taken. [See the note at the end of the appendix to Sugden on Purchases. Ed. 3 p. 612]

for a valuable conſideration; or *deviſe it by his laſt will.*

So if *the perſon entitled to the executory eſtate comes in as a vouchee on a common recovery*; ſo *if he levy a fine*, it ſhall bar him by eſtoppel. (a)(b)

CHAP.

CHAP. XV.

OF A CONDITIONAL LIMITATION.

2 Black. Comm.
1 Fearne. 9. 414. Sand. Uſes. 182. &c.

A *Remainder* is to *commence* (a) when *the particular eſtate* is, from its very nature, to *determine*; it is, as it were, a continuance of *the ſame eſtate*; *it is a part of the ſame whole.* *A conditional limitation* is *not* a *continuance of the eſtate firſt limited*, but is entirely a *different* and *ſeparate* eſtate. It is *not* to commence *on the determination of the firſt, but the firſt is to determine when the latter commences.* (b) It is *the commencement of the latter* which reſcinds and deſtroys the former; and not the *ceaſing of the former* which gives exiſtence to the laſt. The particular eſtate and remainders are, in fact, as the very terms imply, *but one and the ſame eſtate.* The eſtate firſt appointed, and the conditional limitations, are *ſeparate* and *diſtinct eſtates.* (c)

Eſſay on Eſts. Inhod. ch.

If

(a) In posson, or (rather) be capable of coming into posson.

(b) Every limitation by executory devise or springing or shifting use, which is to take effect on an event is a condl. limiton.—

And the case of a Grant for years, with a condon (or rather grant) to have the fee on an event, is an instance of a conditional limiton at the common Law, and is the only instance that has ever fallen under my notice.

(c) But a Limiton may be so framed as to be a rem. in reference to the part. estate, and a condl. Limiton as to another — Estate. Loddington v Kime 1. Salk. — 224. L.d Raym. 203. Espay on Ltd. Fearne Butl. edition 152.

(a) and this is not necessarily the case of a remr. for the limitn over may be to take effect in derogation and abridgemt. of the estate tail as in case of marriage under 25. Non residence &c: & then it is a condnl limitation & equally barrable by tenant in tail; & Mr. Fearne's observation (in p 50) is applied to the instance of an estate by condl. limitn to take effect in — derogn & abridgmt. of an Estt. tail.

If *an eſtate tail* is firſt limited, and then a conditional limitation is made upon that eſtate, *a recovery* ſuffered by the tenant in tail, before the event or condition happen on which the limitation is to ariſe, will bar the eſtate depending on that event or condition.*(a)*

But this is properly a *remainder*. See 2 *Fearne*. 52. &c.

As to the barring ſuch conditional limitation by *eſtoppel*, and aſsigning in equity, or deviſing it, the law ſeems to be the ſame as with reſpect to an executory deviſe.

CHAP.

CHAP. XVI.

Com. Dig. Estr.

OF A REVERSION.

2 Bl. Comm. 175. Co. Litt. 22. b. Plowd. 151. Throckmorton v. Tracy.

WHEN a perſon has an intereſt in lands, and grants *a portion of that intereſt*, or, in other terms, *a leſs eſtate than he has in himſelf*, the poſſeſſion of thoſe lands ſhall, on the determination of the granted intereſt or eſtate, *return* or *revert to the grantor*.

Gilb. on Ten. Rhod. Ch.

It muſt here be remarked, that it is ſaid the *poſſeſſion* of the lands ſhall return to the grantor on the determination of the grant, for a *preſent intereſt* remains even during the exiſtence of the grant in the perſon making it; and this intereſt is that which is called *his reverſion*, or, more properly, *his right of reverter*.

This

(A) Because an estate limited by the act of the party, to take effect after the determination of the particular estate is called a remainder. Thus if a grant be made by A. to B for life, without more, the fee expectant on B's life estate reverts to A. and is called a Reversion; but if the grant be to B. for life, and after his decease to C. in fee, C's estate is called a Remainder.

This right of reverter can only arise by the *act of law*; it *cannot be created by the act of the party*, though it is a consequence of his previous act.[A] If a person limit particular estates to strangers with the ultimate limitation to himself in fee, or to his own right heirs, the latter limitation shall not take effect *as a remainder*, or by reason of the *express limitation* of the grantor; but, as the law would have given to him or his heirs, as a consequence of the preceding limitation, the same interest or estate as the express words would have conveyed, those words shall be deemed wholly nugatory, and the grantor or his heirs shall be in *in reversion*, or of *the old estate*. *Watk. on Desc.* 168.

A reversion, being *an immediate interest*, may be conveyed to another person, though to an utter stranger. The conveyance of it need not be confined, like the conveyance of a right, to the actual tenant of the freehold. The proper mode of conveying a reversion is by *grant**; though it *Watk. on Desc.* 110. 111.

* Mr. *Fearne* is represented as having been of opinion (*Posthum. Works*, 28.) that the *grant* of a reversion,

(a)

* See n. (1.) to *Co. Litt.* 270. a. & n.(1.) to 271. b. f. iii. *Sand. Uſes.* 450—5. 469.

may alſo be paſſed by *a leaſe and releaſe* *, or *bargain and ſale*, ſuch bargain and ſale being regularly enrolled; or the reverſioner

verſion, in conſideration of *money*, *would require enrollment under the ſtatute of Henry* VIII. But he was evidently miſtaken if he entertained ſuch opinion, as the ſtatute of 27 *Hen.* VIII. *c.* 16. is expreſsly confined to conveyance by bargain and ſale *only*, and does not embrace grants, which have nothing to do with a bargain and ſale. Beſides, that ſtatute has an immediate and manifeſt relation to *the ſtatute of uſes*; and was ordained in order to prevent *ſecret transfers*, which might have been effected by a bargain and ſale, as the bargainor would ſtand ſeized to an uſe, and that uſe would have been immediately executed by the ſtatute, as, at this time, is the caſe of a bargain and ſale of a chattel intereſt, or leaſe for a year. The *bargain and ſale* were, therefore, ordered to be enrolled; but *a grant* of a reverſion was *not*, at the time of that ſtatute, a *ſecret conveyance*, as it was not good without *attornment*, which was a matter of publicity, and anſwered the ſame purpoſes as livery did on a feoffment.

Of *attornment*, See *Gilb. Ten.* 81. & *poſt.* b. 2. c. 2.

2 *Vent.* 149. &c.

And the only caſe which Mr. *Fearne* has referred to is that of Lade *v.* Baker, which cannot apply to the ſubject at this day, ſince the ſtatute of *Ann* has rendered attornment unneceſſary.

may

a) and this is the general practice that the party may have in his own hands the means of shewing that there was a particular Estate. (B)

(B.) This, which is a very good and sound doctrine wants a little explanation. In order to effect a good Conveyance of a reversion by Grant it would be essential that there should be a present particular estate in existence But a purchaser might not have complete evidence of that fact, and therefore might have a difficulty in proving his title. The conveyance by lease and release avoids this difficulty as it proves of itself, that there is a particular Estate (viz: for a year by the lease) giving a vested interest and capable of being enlarged by the release and of course a reversion expectant on that estate And that this reversion is released to the tenant of such particular vested Estate

(a) For an estate of Freehold.

(b) unless it be in the Crown. and the estate tail is of the gift of the Crown for services performed &c

---

(A) A Charge is a mode of conveyance unknown to the law. In order to give a man any legal Interest, he must be brought into the ownership by a Conveyance of the whole or part of the interest of the party from whom he claims, as by feoffment, Grant Lease & Release &c or demise: or he must be put into ownership by execution of legal process as by writ of elegit on a Judgment recov. Judgments are therefore called Charges on estates, not because they give an ownership a legal interest, but because they confer the power of acquiring one.

Charges in equity are created by such acts & circumstances as give a person a right to be paid a sum of money, or to an indemnity &c out of the produce by sale or otherwise of an Estate or Int. in lands or goods without passing any legal ownership or interest. It is obvious therefore that they may exist upon every species of property whatever. J. H.

may *covenant to ſtand ſeized*†; but a reverſion cannot be granted (a) to commence *in futuro*‡.

† 2 *Co.* 15. Wiſeman's caſe.

‡ *Watk. on Deſc.* 111. n. (t.)

But, even anterially to the ſtatute of frauds (29 *Car.* II.), a reverſion could not be conveyed *by parol*; it muſt have been *by deed*, as it lay not in livery. For where *the poſſeſſion did not paſs*, the law required *a deed*, or a ſolemn inſtrument under ſeal, when there was no matter of record, as the evidence of the transfer.

A reverſion may alſo be *charged* by the perſon entitled to it. (A)

If an eſtate tail be created, the reverſion, unleſs it be in the crown, (b) may be barred or deſtroyed by the tenant in tail ſuffering *a recovery* of the premiſes by virtue of the ſtatutes of *Hen.* VII. & VIII.

See *ante. c.* 8. & *poſt.* b. 2. c. 16.

The reverſioner continues tenant to the lord during the exiſtence of the particular eſtate; and the particular grantee ſhall hold of the reverſioner; and, as a neceſſary

conſequence or incident, the rent, fealty, &c. ſhall always follow the reverſion.(a)

Plowd. 153. 155. As the creation of a particular eſtate is of abſolute neceſsity to give exiſtence to a reverſion, ſo the continuance of the reverſion depends upon the continuance of the particular eſtate; for if, by any means, as by forfeiture, ſurrender, or regular expiration, ſuch particular eſtate determine, the intereſt of the grantor ceaſes, of neceſsity, to be an eſtate *in reverſion*, and becomes an eſtate *in poſſeſsion*, and into which he may immediately enter.(b)

CHAP.

(a) even tho', it devolved to the Lord by escheat

(b) This is perfectly true when there is one particular estate and no more. When there are several particular estates, they must all determine before the rev'n will become an estate in poss'n

An Est: also which as to one person is an est: in rev'n may as to another person be an estate in remainder [See Essay on est: introd'y. Ch.] (et.)

(A) Quære. The only instance which suggests itself to me, is that of a grant to A. for life, and after his decease to the Grantor and an'o: in fee &c; and this seems to me to be a new Estate because it must be a Joint-tenancy. In every other case (if part be limited to a stranger, & part either limited or suff: to revert to the Grantor) the estates may be similar but not the same.

by *fine**, though by ſuch fine the right would be *barred*, as the cognizor cannot claim a right againſt his own fine, which is a matter of record, and, by conſequence, an eſtoppel; as by that fine he *has acknowledged the right to be in another.* It is not *deviſable.* The proper mode of extinguiſhment is that of *a releaſe*, or fine *ſur cognizance de droit tantum*, to the perſon in actual poſſeſsion of the lands.

* *Touchſt.* 14. 2 *Co.* 55. 56. Buckler's caſe.

Plowd. 485.

CHAP.

(a) Or to any person who has an estate in ~~possession~~ reversion or rem^r. for a release to the part^s tent. as to the Rev^n. or Rem^r. than will enure to the benefit of all those persons, or any of the Privity of their estate. And it is a gen^l. rule that a right once released tho' but for a minute is released for ever, and any limitation annexed to a release of right will be void. (B) See infra the diff^e betw^n a release of Right & confirm^n of an Estate

(b) and when the right is in a Feme Covert, a Fine or Voucher in a recovery is absolutely necessary. So it is when the right is in respect of an Estate tail & if there are any rem^rs &c there sho^d be a recovery; & the better opinion is that the Voucher of a person who has a right under an Est^e tail will bar that right, and also the right of those in rev^n. ~~or rem^r~~ Fearne's posth^l. Works Cas^s &c

The fine most generally used for these purposes is the fine "cum ceo" as it has all the effect of a fine "Sur Cognizance de droit tantum."

(A.) See Goodright & Forrester 8. East. 552. & 1 Jam. Rep^t. 378. and also Wms & Thomas 12 East. 141. as to the devestability of a right of entry.

(B) The proper mode therefore when it is intended that the right shall only be discharged during a certain period is by a covenant not to exercise it during ~~such~~ that period.

(C) This is the case where a Tenant in tail after levy^g a fine, or the issue in tail after a fine by their ancestor suffers a recovery. It seems now settled that the recovery bars the rem^r over

(a) See supra (cap recurs

(b) if coupled with an interest.

(c) when the possibility is in respect of an estate tail. a belongs to a married woman

(d) while the interest is a mere possibility, I conclaim on a fine will not run against the person, because he has not a present interest. 1 Ves. 390.

(e) But if the heir who has merely a right or claim of succession sell in the lifetime of the ancestor and after the descent to the heir, he dies, the Courts will not decree a specific performance of the contract implied by the sale. The Court of Exchequer contrary to Mr. Serjt. Hill's opinion — treated the equity against the Ht heir as merely personal. [1st anstw. Rep. p 11 Morse v Faulkner. (A)

A. But 2. whether this case would be followed; it seems hardly intelligible.

CHAP. XVIII.

OF A POSSIBILITY.

A Poſsibility cannot be on a poſsibility (a). A poſsibility may be *releaſed* (b); is *deviſable* (c); is *aſsignable by commiſsioners of bankrupt* (d). It may be barred *by fine*, by way of eſtoppel (e); but it ſhould ſeem not otherwiſe (f). So it *is aſsignable in equity*, at leaſt if accompanied with an intereſt (g); ſo an agreement to ſettle lands in poſsibility ſhall be decreed, if they afterwards deſcend (h).

(a) 4 *Co.* 50 b.
(b) 1 *Strange.* 132. 2 *Atk.* 420.
(c) 1 *Hen. Blackſt.* 30. 3 *Durnf. & Eaſt* 88.
(d) 2 *Pr. Wms.* 132. 2 *Atk.* 420.
(e) 10 *Co.* 50. a.
(f) See 1 *Ves.* 390.
(g) 2 *Fearne*, 522. 2 *Bl. Comm.* 290.
(h) 1 *Ch. Rep.* 158.

CHAP. XIX.

OF AN EQUITY OF REDEMPTION.

2. *Bl. Comm.* 158. *Powell on Mortg. paſſim.* *Butl.* n. (1.) to *Co. Litt.* 205. a. & (1.) to 208. a.

IF a perſon convey lands to another on condition, as a ſecurity for money, and the condition be broken, he may, under certain circumſtances, *redeem* the premiſes; and this privilege is denominated his *equity of redemption.*

Such equity of redemption may be *releaſed* to the perſon in poſſeſſion. Sometimes, indeed, the conveyance called *a leaſe and releaſe* is adopted; but then the latter ſpecies of conveyance does not operate as a leaſe and releaſe with reſpect to the equity, as a perſon *cannot be ſeized of an equity to an uſe*; and, conſequently, as no uſe ariſes by the bargain and ſale, the releaſe can only operate, with reſpect to

(a) The operation certainly is, as the release of a right, and sometimes tho' very rarely a — release alone is relied on. No doubt exists of its efficacy. So the equity of redempt^n may be transferred by mere Contract or Grant, but it is the general practice in both cases to take a Lease & Release.

the equity, as a mere or proper releaſe; juſt as it would have done *without* ſuch a bargain and ſale, or leaſe for a year. (a)

The conveyance by leaſe and releaſe is, therefore, adopted for caution only; as, *in caſe there be an equity* only in the perſon intending to convey, ſuch releaſe will operate *as a common releaſe*, and ſo paſs it, notwithſtanding the bargain and ſale; and, *in caſe there be any legal freehold, intereſt, or eſtate, left in the mortgagor*, by reaſon of any defect in the mortgage deeds, *then* the bargain and ſale will operate on ſuch legal intereſt or eſtate, and, with the releaſe, paſs that alſo.

In like manner, as a court of equity conſiders a mortgage, though in fee, merely *as a ſecurity for money* till the time of redemption be paſt, the mortgagor frequently diſpoſes of his own equity, or right of redemption, to another. This can properly be only by way of *aſſignment, grant*, or *deviſe*; for he *cannot* paſs it by *feoffment, bargain and ſale*,† nor, conſequently,

See 3 *Bro. Ch. Ca.* 289. Traſh *v.* White.

† An Equity of Redemption may be conveyed by Bargain & Sale pursuant to 29 Car. 15

quently, by *leaſe and releaſe*, as the ſeiſin, or legal eſtate, *is in the mortgagee*; though the leaſe and releaſe are often adopted for the reaſon before noticed with reſpect to the conveyance of ſuch an equity to the perſon in poſſeſsion. *(a)*

(a) And if a feoffment a Bargain and Sale is made, it will in equity have the operation of a Grant or Assignment of the Equity of Redemption. (A)

(A) a similar reason exists for preferring a Lease & Release in this case as in those before noticed.

(a) The case of Holland v Bonis 3. Leonard 175 and Com: Dig. Barg: & Sale 3 (b) seems to have decided that tho' a Corporation cannot — stand seized to a use, they may give a use and therefore their bargain and sale shall be an effectual assurance.

The Bargain and Sale is supported on the difference that the Corpor: may give an use tho'. they cannot stand seized to an use Com Dig: Cruise on Uses. 69. This distinct: is too refin? to be relied on in practice. It is therefore usual in alienations by Corporations to convey by feoffm: or Lease & Release Grant &c. & when there is a Lease & Release from — them it is recommended that there sh? be an actual Entry under the lease — before the Release is executed.

If the Lease operates as a Bargain and Sale for a year, no such entry too? be requisite, as the Stat. would annex the est: to the use arising under the — barg: & Sale.

CHAP. XX.

OF USES AND TRUSTS.

Com Dig. Barg. Hale Uses.

IT is neceſſary to the creation of ſuch an uſe as may be executed by the ſtatute, that there be a *perſon to ſtand ſeized of certain hereditaments to ſuch an uſe*; that there be *a perſon capable of taking that uſe*; and that there be *privity of eſtate* and *privity of perſon.*

2 *Bl. Comm.* 327. *Butl.* n. (1.) to *Co. Litt.* 271. b. (1.) to 290. b. 384. a. & add. notes. *Booth's Opin.* at the end of *Touchſt.* & in 1 *Coll. Jurid.* 421. *Sand. Uſes. paſſim.*

1ſt, There muſt be a *perſon ſeized*; for a *corporation* cannot ſtand ſeized to an uſe; and, therefore, if a corporation convey, it muſt be by feoffment, leaſe (with an actual entry) and releaſe, &c. though the courts will, if poſsible, ſupport a bargain and ſale by a corporation, as ſome other ſpecies of conveyance, rather than that it ſhould avoid its own act. (a)

Sand. 446.

2dly, There

2dly, There must be a person *seized* of *hereditaments*;[a] [b] for *chattels*, whether real or personal, are not within the statute: though a person may stand seized of the freehold to the use of another for a chattel interest; as *A. B.* being seized in fee, may covenant to stand seized to the use of *C. D. for years*; and such use will be executed by the statute. And this is every day seen by the lease, or, more properly, by the bargain and sale, upon which a release is grounded. But chattel interests may be conveyed subject to certain *trusts*, as commonly practised.

3dly, There must be a person *capable of receiving the use*;[c] and, therefore, a limitation to the use of a corporation would not be good without licence,[d] as it would be within the statutes of Mortmain.

4thly, There must be *privity of estate*; for he who comes in in the *post*, or paramount the person limiting, shall not be subject to it.

5thly, There

(a) It is more apposite to say there must be a — person seised for an estate of freehold and inheritance.

(b) Some hereditaments, as annuities, offices of trust, authorities cannot be conveyed to an use — [Jones 127. Com. Dig. Uses A]

(c) This branch is generally applied to shew — that there must be a cestui que use in esse capable of receiving the use. But I incline to think contingent uses become contingt estates. See ~~Estate~~ Essay on Estates Introd. Chapt. A

(d) This licence is generally contained in the — charter of incorporation.

See on the subject of the execution of contingent uses. Butl. Co. Litt. 271. b. note 1. Sand. on Uses. Sugden on powers Chap. 1 Sects. 1. 2 & 3. and Bowes Scintilla Juris

It has always been considered that a conveyce to and to the use of A vested the legal Estte in A, tho' a subseqt. use has been ~~declared~~ declared in favor of some other person: & I have never seen an Instance in which this precaution has been observed. (Preston

5thly, There muſt be a *privity of perſon*; for a purchaſer *without notice* ſhall not hold charged. 1 *Fearne*, 479.

There cannot be *an uſe upon an uſe*. If an eſtate be limited to *A. B.* and his heirs, to the uſe of *C. D.* and his heirs, to the uſe of *E. F.* and his heirs, the ſtatute ſhall execute *only the firſt uſe*, or that to *C. D.* and the limitation to *E. F.* will be only *a truſt* in equity *.

Upon

* If the limitation to *E. F.* and his heirs be intended as *a truſt*, it would be prudent to give the eſtate to *A. B.* and his heirs, to the uſe of *C. D.* and his heirs, to the uſe of, or in truſt for, *E. F.* and his heirs; for if it be given to *A. B.* and his heirs, *to the uſe of himſelf* (A. B.) *and his heirs*, to the uſe of, or in truſt for, *E. F.* and his heirs, it might be open to the objection, that *A. B.* would be *in by the common law*; and ſo the limitation of the uſe *to him and his heirs* be nugatory; and that, conſequently, the limitation to *E. F.* would, in ſuch caſe, be, in fact, *the firſt uſe*, and executable by the ſtatute; and, conſequently, that *E. F.* would take *the legal eſtate* to him and his heirs.—Now, whether ſuch objection could be ſupported or not, it would be highly proper to obviate it by limiting the eſtate to *A. B.* (an indifferent perſon) and his heirs,

2 Bl. Comm. 336.

Upon this principle, however abſurd in itſelf, many important doctrines are founded. Hence, if it be wiſhed that a perſon ſhall have only *a truſt eſtate*, care ſhould be taken to limit a preceding, and at leaſt commenſurate, uſe, ſo as to be executed by the ſtatute; as, "to *A. B.* and his heirs, *to the uſe of him and his heirs during the life of C. D.* and from and after the deceaſe of the ſaid *C. D. to the uſe of the heirs of the body of the ſaid C. D.*;" when the eſtate limited to *C. D.* would *be a truſt only*; and the remainder to the heirs of his body would be a proper uſe, executed by the ſtatute the moment he died. And the eſtate to him being equitable, and that to his heirs legal, could not unite; and ſo the latter would not be barrable by him.(a)

---

heirs, *to the uſe of* C. D. AND E. F. (the truſtees) *and their heirs*, to the uſe of, or rather in truſt for, *G. H.* and his heirs, as then the uſe to the truſtees would be executed, and the legal eſtate would, unqueſtionably, be in ſuch truſtees; and, conſequently, any ſubſequent limitations would be inexecutable by the ſtatute.

Hence

(a) The more prevailing practice is to limit the use to A for life. Remr. to Trustees for his life to support contingt. Remrs. Remr. to the 1st & other sons in tail; Remr. to the daus as Tenants in common in tail, with cross remrs between them as in tail. And if A is a married woman, the limitation to her may be omitted and Trusts declared for her separate use

(a) 9 if he has not a seisin in the mean time subject to be defeated in case there shall not be enrolment within the limited time? (A)

(A) certainly he has.

It is admitted that he is a good tenant to a writ of entry before enrolm.t and also that a Sale by him before enrolm.t is good so as in each case there is enrolm.t in due time. This proves that the bargainee has seisin before enrolment.

(B) The rule is that a use cannot without a new Conveyance, Bargain & Sale, &c. be declared of a Seisin arising by means of the Stat. of uses. On this ground.

1 a Bargainee
2 a person taking under a Cont. to stand seized
3. an appointee
4. Any other Abburgue use cannot stand seized to an use.

But the rule is confined to a seisin under the Stat. of uses, and therefore the Bargainee under an authority in a Will may be seised to an use.

(C) It cannot remain in the trustee a feoffee without express declaration or necessary implication and then in fact the use is not future, quoad the Trustee &c tho' his estate is liable to be defeated, or postponed on the arising of the future use

(d) The "or" must be read, in this place, in the alternative for every springing or future use is not [illegible] Use. P. Tracts

Hence alſo an uſe cannot be limited on *a bargain and ſale* to any but the *bargainee*; for, till enrollment,(a) the bargainee himſelf has but an uſe, and he cannot be ſeized of an uſe to the uſe of another perſon; and the limitation over would be a truſt: and ſo as to a *covenant to ſtand ſeized*.(b) If, therefore, it be intended that a third perſon ſhould take an uſe executable by the ſtatute, ſome other ſpecies of conveyance (as a *fine*, *feoffment*, or *leaſe and releaſe*) ſhould be had recourſe to.

An uſe need not take effect immediately on the creation of the deed, like an eſtate of freehold. It may commence in *futuro*; for the freehold remains in the truſtee,(c) or covenantor, or bargainor, who is to anſwer to the *præcipe* of others, and perform the feudal duties. But the contingency upon which the uſe is to ariſe muſt be ſuch as may happen within a reaſonable period, as a life or lives in being, or 21 years afterwards; and uſes ſo limited are called *contingent* or *ſpringing uſes*,(d) which may be deſtroyed or defeated *by deſtroying the eſtate out of which they are to ſpring*. 1 *Fearne*, 435, 436.

An

See as to shifting the second estate on the accession to the family estate, *Butl.* n. to *Co. Litt.* 327. b. 328.

An use may also be limited so as *to change, after execution, to another person*[a]; as to the use of *B.* for life, remainder to first and other sons in tail, remainder in fee; *provided that if there be no issue living at the death of B.* then to the right heirs of *C.* for ever. And this is called a *shifting* or *secondary* use; but, like the latter, it must take effect, if at all, within a life or lives in being, &c. or one and twenty years afterwards. (b) (A)

If such shifting use be limited on an estate *in fee*, it *cannot be destroyed or barred by the previous taker*; but, if on a limitation *in tail*, it may. c

1 *Fearne*, 205.

And so with respect to *trusts:* some are completely established, and so as to take effect immediately, by the very deed which conveys the legal estate to the trustee, and are, therefore, frequently called trusts *executed*; while others are to be carried into execution by some future act to be done by the trustee; and these are often denominated trusts *executory*. The *first* species of trusts *have the same construction as legal estates*; while the *latter*

XX Because such a power would enable a person to prevent the disposition of the fee whenever the child attained his age of 21. But the est. arising under the execution of such a power would be a contingent use and concerning this same would hold as to any partial power, as to portions leaves annexed to such a life estate for the donee herein enabling will be because the donee

(a) or so as to admit of the insertion of an intermediate or particular estate, partially defeating or postponing the other Estate: as in cases of Jointure leases &c. So one estate may be defeated, and another, limited by way of remr. accelera

(B) Unless the shifting use is annexed to an estate tail, and then the time may be indefinite, because the Tenant in tail by suffering a common recovery may bar all springing, shifting or contingent uses dependant on the estates tail

(c) And this is the reason of the distinction already noticed

(cA) It would be more correct to say "an use must be limited," so as not to prevent the "alienation of the fee of the Estate longer "than during a life or lives in being, & the "minority of some person to be born in the life "time, or within one time after the death of "the last surviving Cestuique vie" As the position stands in the text it is inaccurate; for a life Estate may be limited to an unborn child, in remr. after a life estate to its parent and a power of sale may be annexed to the child's life estate: which power I conceive he might execute at any period of his life altho more than 21 years after the parent's death. XX

* may extinguish them XX

(a) on this subject See Phillips v Bridges 3 Bes. Jun. That a Recovery by a Tenant in tail in equity may bar the Ltt. Tail & remrs over, sev.l circumst.ces must concur.

1st The owner of the equitable freehold must be — named Tenant to the writ of Entry

2nd. The Tenant in tail must be vouched and — vouch over, supposing the recovery to be with double voucher according to the general practice

3rd The Remrs must be equitable & not legal Estates.

4. The same terms must be observed as are requis.e to the ~~recovery~~ validity of a recovery of a legal Estate.

First it is generally true that the owner of the equitable Freehold must be named — Tenant in the writ of Entry, but sometimes the equitable ownership arises from a is united with the legal Estate. When this happens, it will be no objection to the Recovery that the tenant to the writ of entry has the legal Estate which confers the right to the equitable a beneficial ownership.
Second. This is sufficiently obvious
Third. Unless the rem.rs are of equitable Est.s the Recovery will not be binding on them. But in Robinson & Cunnin — Fon. 163 & 1 Atk 473 where the trustee had the equitable Fee subject to an equit.ble estate Tail (having also the whole legal fee) Lord Talbot and after him Lord — Hardwicke decided that the recovery + barred the equitable Fee of the Trustees in the same manner as if that estate had been in an indifferent person.

are *carried into execution ſo as beſt to anſwer the intention of the perſon creating them.* (A)

When an uſe is wholly or partially undiſpoſed of, it ſhall *reſult* to the grantor.

The *ceſtui que truſt* may transfer his intereſt over to a ſtranger; and if ſuch *ceſtui que truſt* be tenant in tail in poſſeſſion, he may even ſuffer *a common recovery*, though there be no legal tenant to the *præcipe*; (a) ſo he may levy *a fine*. *Piggot*, 104. 1 *Coll. Jurid.* 214. 2 *Ves. Jun.* 120. 1 *Cru.* 187.

In certain caſes the *ceſtui que truſt* may call in the legal eſtate; and, by a bill in equity, oblige the truſtees to convey. 1 *Fearne*, 483. *Sand.* 261.

In ſome caſes it is proper to keep the legal eſtate outſtanding, in order to guard againſt meſne incumbrances, &c. This is uſual with reſpect to terms of years, which ſhould, generally, be kept on foot for the ſecurity of the purchaſer, and, in ſuch caſes, carefully aſſigned to a perſon of his own nomination in truſt to attend the freehold or inheritance.

(A) on this distinction doubts exist. See Dutchess of Newcastle v Lady Lincoln 12 Ves. Jun. 218.

If

Watk. on Dejc. 191. *2 Ves. Jun.* 120. Brydges *v.* Brydges. If a truſt and legal eſtate unite in the ſame perſon, the former, generally ſpeaking, becomes merged or extinguiſhed.(a)

In conveyances creating truſts there ſhould be clauſes enabling the truſtees to deduct expences; and ſometimes an expreſs allowance ſhould be given them for their time and trouble; that they ſhall not be anſwerable for monies not actually received by them, or for what ſhall be loſt without their fault. It is frequently neceſſary alſo to give them power, either with or without conſent, to ſell or exchange the lands, or transfer ſtock, &c.

Some of the many instance in which it is necessary to resort to a conveyance to uses to accomplish the intent of the parties.

Before the Stat: of uses, the practice was to vest the legal Estate in Trustees &c and sometimes to have a feoffment upon condition of a Reenfeoffment, & the title according to the case.

CHAP.

(a) And consequently if the equitable estate was descend ea parte materna, and the legal ex parte paternâ a e converso, the legal estate will govern the descen Doe v. Wells. Dougl. 769.

There are many purposes which may be accomplished thro' the medium of a conveyance to uses but which cannot be accomplished by means of a conveyance at Common Law independent of the Statute, & this has rendered the conveyance to uses the usual mode of assurance. For 1st at common Law a Man could not grant to his wife but he may make conveyances to her use.

2nd. A Man could not grant with a reservation to himself of a particular estate but a Conveyance may be made by a man to the use of himself for years for life or in tail with remainder to himself or a Stranger.

3d. Again a man could not convey to another & reserve to himself or any other person a power to sell exchange &c. but in Conveyances to uses, such powers may be introduced.

4th. Also at the common law every particular estate determined at the time which bounded its duration and the rule "ex parte statu primitivo, ex parte que derivationis" applied and all interests granted by the Tenant of this particular estate, necessarily determined with the estate out of which they were derived; but by means of a Conveyance to uses powers may be annexed to an estate, which will enable the owner to grant other estates to have continuance notwithstg the determination of his own estate, as in the common case of powers of leasing &c. These are only

(A) a appurtenant.

B. What is here called a collateral power is more correctly a power simply collateral; for a collateral power may be compleat with an interest [Slater v Edwards Hard: 410

CHAP. XXI.

OF POWERS.

A POWER is an authority expreſsly reſerved to the grantor, or expreſsly given to another, to be exerciſed over lands, &c. granted or conveyed at the time of the creation of ſuch power.

Butl. n. (1.) to *Co. Litt.* 342.b. & *add.* n. to 271. *Booth's Opin.* at the end of *Touchſt.* & 1 *Coll. Jurid.* 421. *Powell on Powers.* 2 *Fearne*, 334, &c. *in note.* *Sand. Uſes.* 288, 303, 531—555.

Powers are either *collateral* or *relating to the land*; and thoſe *relating to the land* are either *appendant* (or *annexed to the eſtate*) or in *groſs*.

Collateral powers are thoſe which are given to *ſtrangers*; that is, *to perſons who have neither a preſent nor future eſtate or intereſt in the lands.* (B)

Powers *relating to the land* are thoſe reſerved or given to peſons who *have either a preſent or future eſtate or intereſt in the lands.* Thoſe *appendant, or annexed to the eſtate,* are where a perſon has an eſtate in the land, and the eſtate to be created by the power is to take effect in poſſeſsion *during the continuance of the eſtate to which the power is annexed*; as to make leaſes.

Thoſe in *groſs* are where the perſon to whom they are given has an eſtate in the land, but the eſtate to be created under, or by virtue of, the power, is not to take effect *till after the determination of the eſtate to which it relates*; as to jointure an after-taken wife.

Great care ſhould be taken in the creation of powers, as the appointer can only act according to the authority given. If power be given *to huſband and wife,* the *ſurvivor cannot appoint*; and, therefore, if it be intended that the ſurvivor ſhould appoint, ſuch power ſhould be expreſsly given "*to the ſurvivor of them.*" If a power be given

(a) So a power to appoint by will cannot be exercised by deed.

But a power to appoint by writing, tho' it is required to be sealed & deliv^d may be exercised by deed or will; because each of those instruments is a writing & the publication of a will corresponds with the delivery of a deed.

(B) It is very common to require a power to be exercised by deed or writing signed sealed &c when this is the case the attest^n should contain the word "Signed." Objections have been taken to titles for want of such attestation tho' the deed was signed.

That the Practitioner may not be led into difficulties or Errors on this point it is proper to frame the power so as to make the attestation of sealing and delivering (the common form) only requisite [A]

(c) The more common form is to convey to and to the use of the Trustees, & this is consid^d sufficient to vest the legal Estate in them

---

(A) If the deed be signed de facto the omission of the word "signed" in the attest^n does not seem more of much import^ce In re Queen v. Farquhar. 11 Ves. Jr. 467. and the word may at any time be added by the Witnesses.

given to *A. B.* to appoint by *deed*, he cannot appoint *by will*; and, therefore, if it be meaned that he *ſhould* appoint by will, it ſhould be ſo ſaid.(a) Cowp. 260. Earl of Darlington v. Pultney.

If the power be ſimply to deſignate a perſon, or the like, it ſhould not be clogged with many ceremonies; but, if colluſion or influence is feared, it would be proper to throw certain ceremonies in the way; as to require three or four witneſſes, "*not being menial ſervants*," or the like.(b)

Again; it ſhould be conſidered whether the eſtates to be taken under the power, when executed, are to be eſtates *in poſſeſſion*, or mere *truſts:* if the *former*, the eſtates ſhould be conveyed by the deed creating ſuch power to the truſtees and their heirs, *to ſuch uſes as A. B. ſhall appoint*; and then, on the appointment, *the ſtatute will execute the uſe*; if the *latter*, *the legal eſtate ſhould be placed in the truſtees*; as to *A.* and his heirs, *to the uſe of B. and C.* (the truſtees) *and their heirs*, to and upon ſuch truſts, and for ſuch eſtate or eſtates, ends, intents, and purpoſes, as *D.*

ſhall appoint, as the uſe would then be *executed in the truſtees*, and the eſtates taken under the appointment would be *truſt eſtates* only.

2 *Ves.* 640. Alexander *v.* Alexander.

By a power to appoint to *children*, the appointer cannot give an eſtate to *grand-children*. If the grand-children are to take therefore, it ſhould be provided for: That, in caſe *any* or *all* of the ſaid children die before the power be executed, leaving lawful iſſue, then to appoint among the children then living, and the iſſue of ſuch children who ſhall then be dead, in ſuch ſhares, &c.(a)(b)

See 2 *Ves. Jun.* 357. Routledge *v.* Dorril.

So if *the appointer* die before execution, the power, as to *diſcretion*, ſhall ceaſe; and, therefore, in ſome inſtances, it may be prudent to provide for that event: as, in caſe the ſaid *A. B.* ſhall happen to die in the life-time of *C. D.* or before there be iſſue of *E. F.* &c. without making any appointment, or only a partial or defective appointment, then the like power as given to the ſaid *A. B.* ſhall be veſted in *G. H.* &c. Though when an execution is pre-

(a) When the power is to appoint in favour of Grandchildren, or the issue of an unborn child, there must be some qualification to the power as that the Grandchildren shall be born before appointment, or within the period of lives in being and 21 years.

(b) Sometimes under powers to appoint among children or in their favour the power has been exercised by will & the Limitation has been to the child for life. Rem: to his 1st. and other Sons in tail. In these cases the will has been construed Cy près & the Limitations in favor of the children have been rejected & the child determined to take in tail to give effect to the general int. (A) But in deeds this construction cannot be applied.

(A) The Cyprès doctrine (or that of giving effect as near as possible to the testators intention seems to have been expressly acknowledged in Robinson v Hardcastle 2 T. Rep. 241. 781. But see Brudenell v Elwes 7 Ves. Junr. 382. & 1 East 442 & some cases there cited, in which the doctrine has been disapproved of.

(a) The rule is that the Court will in certain cases aid the defective execution of a power but they will not relieve against the non execution of a power.

(b) So he may tho' the words from time to time be omitted [Digge's case 1 Co.

(c) In a late case much agitated Ves. Jun.r a Limitation was directed to be inserted in a Settlem.t for the wife of a Ten.t for life, he being then unmarried. He married twice and it was det.d that the 2.d Wife was entitled. The Court treated the limitation as made in favour of such Woman as for the time being should be his Wife

(d) There is no clause in which the Language of professional Gent. of eminence is more different than in this; many use such a circuity as makes it difficult to any, except a professional man to collect the sense.

Others on the other hand are very concise using only "in default of such appointm.t and in the mean time subj.t thereto" & this is sufficient & the Cts have even det.d that a limitation over in default of appointm.t without more gives a vested Estate subject to the power of app.t [Cunningham v Moody 1. Ves. 174. Doe v Martin 4 Term Rep.t 39]

(e) A power to appoint new trustees contains

see other side p. 8b

prevented by death, which is an act of God, a court of equity will aid, if it be not merely dependent *upon perſonal diſcretion.* (a)

So it is often proper to make the power more general than is ſometimes done: as to ſuch uſes, and for ſuch eſtates, &c. as *A. B.* ſhall *from time to time* appoint, &c. Powell, 263, as *A. B.* may then execute his power *at different times*, and over *different parts of the lands.* (b) (c) 341.

So proviſion ſhould be made in caſe of *no appointment*, or of a *defective* or *partial appointment:* as, and in default of ſuch appointment, then as to ſuch part or parts of the ſaid premiſes, or to ſuch portion or portions of intereſt of and in the ſame, to which ſuch appointment ſhall not extend, to the uſe, &c. (d)

So if it be intended that *A. B.* ſhould revoke his appointment, and re-appoint, power ſhould be expreſsly given him, *from time to time, either wholly or partially, to revoke ſuch appointment, and limit new uſes.* (e)

In the *execution* of a power it is moſtly proper *to recite it*, and always to *make it apparent on the face of the inſtrument that it is the appointer's intention to execute and act under the power*; and, therefore, reference ſhould be made to the premiſes by deſcription, &c. And it is beſt to ſay expreſsly, that *under and by virtue of ſuch power, ſo given, &c. and in execution of it, the ſaid A. B. doth appoint, &c.*

Too great care cannot poſsibly be taken in the execution, to comply with and follow the requiſite ceremonies: as, if it be given to *C. D.* to appoint, with the approbation of her huſband, teſtified by his being party to and executing the deed in the preſence of three witneſſes, &c. *the approbation of the huſband, his being a party, his executing the deed in the preſence of three witneſſes*, &c. muſt be ſcrupulouſly complied with, and may be even ſtated.(k)

Hawkins v Kemp 3 East 410.

And as the *exceſs* only, in the execution of an appointment, will be bad, and a deficient execution cannot be extended, it is prudent *to be very full in the execution*,

as

from other side] inclusively, in effect at least, a power to revoke the old ones, but a mere power to revoke will not authorize a <u>new appointment</u>. Therefore when there is to be a power to appoint anew, there must be an express provision to that effect

A power to revoke & appoint new uses from time to time, cannot after it has been once exercised be revoked by a second appointmt. without a reservation of a new power, & to the exercise of powers of nomination, or designation, no power of revocation can be annexed, unless it is expressly authorized by the orig. power: and therefore in powers of nomination a designation, it is proper to add that the power may be exercised, with & without power of revocation and new appointmt.

(b) but it is not necessary that it should be stated.

(B) In equity; for at law it is otherwise, the execution being wholly bad if it is not exactly authorized by the power

(a) If it is the intention. For all cases of this sort depend on the intention.

(b) It always will be absolute, for since it is determined that an estate arising from the exercise of a power cannot be revoked without reserving in the appointment an express power for the purpose.

(c) I apprehend a Lease and Release or a Barg.n & Sale which purported to be a convey.ce in fee, wo.d (as between the parties) put an end to the rights of exercising a power in gross. It wo.d constructively be a release of the power. but qy.

(d) Hence it is said that the Limons in the appt. must be read as if inserted in the deed — creating the power.

But this seems too general, & must be — understood with many qualific.ns — applicable to different cases accord.g to their circumstances.

There seems to be a prevailing opin.n that a Limon to the ancestor by a deed — cont.g the power & to his Heirs or heirs of the body in a deed exercising a power, will give the ancestor the benefit of a Limon to his heirs.

This point was considered but not decided in Venables v Morris 7 Term reports — 342. 438. See also Fearne p 60. (Butl. Edn. and Prestons view of the rule in Shelly's case.

(e) That is simply collateral and not coupled with an interest but which are mere — authorities. As powers to sell & exchange Powers of nomination & design.n

as the ſurpluſage ſhall not vitiate what would otherwiſe be good.

If power of revocation and re-appointment be given, and the appointer execute, he (a) ſhould reſerve in ſuch appointment a *new power of revocation, with power alſo to appoint new uſes*; as, without this expreſs reſervation of future revocation and new appointment, the firſt may often be abſolute. (b)

2 *Burr.* 1148. *Preced. Chanc.* 474. *Touchſt.* 524. & *Booth's Opin.* ibid. & 1 *Coll. Jurid.*

Powers *appendant* may be *deſtroyed* by leaſe and releaſe, bargain and ſale, feoffment, fine, or recovery; thoſe *in groſs* by the three latter ſpecies of conveyance, or they may be releaſed. (c) Powers *collateral* (e) cannot be deſtroyed by the act of the perſon to whom they are given.

Butl. n. (1.) to *Co. Litt.* 271. b. ſ. iv.

And note, as the appointer is merely an inſtrument, the appointee ſhall be in by the original deed. (d)

2 *Vez.* 78. *Co. Litt.* 299. b. n. (1.) 1 *Fearne*, 99, &c. 2 *Burr.* 879.

CHAP. XXII.

OF RENTS.

2. Bl. Comm. 41. Gilb. on Rents. Lit. Rent.

A Rent *(Reditus)* is, properly, a ſum of money, or other thing, to be rendered periodically, in conſequence of an expreſs reſervation in a grant or demiſe of lands or tenements, the reverſion of which is in the grantor or perſon demiſing.

A rent, therefore, neceſſarily ſuppoſes a reception of ſuch lands or tenements from another, to whom they primarily belonged, and in whom the ultimate property is ſtill veſted: hence it follows, that, if lands or tenements were *not* derived from another, as anciently when lands were held *in allodio*, or if no other perſon has ſuch ultimate property in him, there can be no rent.

If

(a) The difference between a Rent in the strict and proper sense of the term, and a Rent-seek or Rent-charge is that a Rent is a reservation by and to the Revers^r. A Rent seek or Rent charge arises by the grant of the Grantee of the Land. At least this is the construct. of Law; tho' it is not exactly consist^t with the words of the instrum^t.

If a perſon, conſequently grants over *his whole property* in certain premiſes to another, the other, (or grantee) paying to ſuch perſon and his heirs a certain ſum annually for ever, ſuch annual ſum will *not be properly a rent*, as the grantor has no ultimate property or reverſion in him. Such annual payment is, indeed, commonly denominated a *rent* charge or *rent* ſeck; but it is not ſtrictly and in reality a *rent*; and the law accordingly reſpected it differently, as it gave the grantor no power of diſtreſs without a ſpecial ſtipulation. (a)

Again, if a perſon grants an annual ſum to be iſſuing out of his lands to another and his heirs for ever, without parting with any property in the lands themſelves, it will be no *rent*, as it is no *return*, no *compenſation*, ſince the grantee has no lands in conſequence of ſuch grant for which to *render* or *return* a *compenſation*.

As, however, the ſum ſtipulated to be paid is an annual, or, at leaſt, a periodical ſum, and

and to be iſſuing out of lands, it is, by reaſon of its analogy to the proper rent, denominated a *rent* charge, or a *rent* ſeck, according as the power of diſtreſs was or was not given.

Again, as a proper rent is a compenſation or return for the enjoyment of a particular eſtate, it follows that when the particular eſtate determine the rent muſt alſo ceaſe.

As the returns of the feud were conditions, on the breach of which the feud reverted to the lord, ſo the non-payment of rent occaſioned a forfeiture of the lands out of which it was to iſſue.

The rigour of the feudal law with reſpect to forfeiture, in the caſes of non-payment of rent, was ſoon, however, abated. It was thought unreaſonably ſevere to inſiſt on an abſolute forfeiture of the premiſes on non-payment of rent at the very day on which it was reſerved; and the law of diſtreſſes was, therefore, adopted from the civil code. But, as the

diſtreſs was merely a ſubſtitute for the feudal forfeiture, it follows that it could only take place where *that* was allowed. If a perſon had no right of reverter, therefore, as in the caſes where the lands out of which the annual payment was to iſſue had not moved from him, or where he had parted with his ultimate property in the lands which had originally moved from him, there could be no forfeiture to him of the lands or tenements; and conſequently he could not be entitled to a diſtreſs which was merely ſubſtituted for the former remedy. If the particular eſtate for which the rent was to be rendered had expired, there could poſsibly be no forfeiture; as the eſtate which only could have been the ſubject of forfeiture had ceaſed to exiſt; and, conſequently, there could be no diſtreſs.

In the two former caſes, indeed, a power of diſtreſs might have been expreſsly created, but then it was, as the terms import, a private ſtipulation between the particular parties, and not a remedy given by the law. The law, however, has been altered in

this reſpect, by ſtatute 4 *Geo.* 2. *c.* 28; and in the caſe of the expiration of the term by the ſtatute 8 *Anne*, *c.* 14.

If the leſſor be ſeized *in fee ſimple*, the proper rent ſhould be reſerved *to him*, "*his heirs and aſsigns*;" if he have only a *chattel intereſt*, to *him*, "*his executors, adminiſtrators, and aſsigns.*" Though the beſt way of reſerving ſuch rent is to reſerve it *generally*, without expreſsing to whom; as "yielding and paying therefore, yearly, during the ſaid term, the ſum of, &c." as the law will give it to the perſon who ſhall be, from time to time, entitled to the immediate reverſion, which the rent will always follow; for as the rent is only a compenſation for the lands, it ſhall go to him who would have been entitled to the lands in caſe the compenſation failed. A

8 *Co.* 71. a. 1. *Vent.* 148. 161. *Gilb.* Rents, 64, &c.

Though the ſtatute, 4 *Geo.* 2. has given the ſame power of diſtreſs in caſes of rents ſeck as in thoſe of rent charge, it is ſtill uſual to inſert a ſpecial power of diſtreſs in the grants of rent; and ſuch ſpecial

(A) This may be very right so far as respects the clause of reservation only: but as the Covt. for paymt. of rent it seems necessary to express to whom the rent is to be paid: otherwise the Lessor in bringing an action on the Covenant must make out his Title, & it is conceived that one object in taking an express Covenant is to avoid that.

(a) but not by a fine executed, except through the medium of a declaration of uses.

(b) ~~seizes of the Lands~~ And a release to a Remr. shall will entitle the owner of a particular Estate to the benefit of the — Release, and e converso.

But a grant to the partlar Tenant a Remainder Man cannot be taken — advantage of by any other person than the Grantee.

(c) A Rent on its first creation may be granted to commence in future: but having been once created, the freehold cannot be put in abeyance by a Grant at the Common Law to commence in futuro; But on a — Conveyances of Rents to Uses and also in Covenants to stand seised &c there may be a future use of Rents and there may be an executory devise of them

ſpecial power is generally accompanied alſo with a clauſe of entry on non-payment, with power to enjoy till the arrears be ſatisfied.

Rents charge or ſeck may be created by *fine**, *recovery*, *bargain and ſale*, *leaſe and releaſe*, *covenant to ſtand ſeized*, or *grant*; and may be limited to one in tail with remainders over. *Sand.* 332.

They may alſo be *releaſed to the perſon ſeized of the lands*; or *conveyed to a ſtranger* by *grant*, and that even to commence *in futuro*, or *under the ſtatute of uſes*; as a perſon may be ſeized of a rent to an uſe, which uſe will be immediately executed by the ſtatute. So a *fine* or *recovery* may be of a rent. *Sand.* 163. *Butl.* n. (2) to *Co. Litt.* 298. a. *Pigg.* 97. 1. *Cru.* 120, 248. 2. *ibid.* 215.

If a Rent be limited to A. B. in tail *with remainder over in fee*, A. by ſuffering a recovery, may bar his iſſue and the remainder over, and gain *a clear and* *Pigg.* 97. *Butl.* n. (2) to *Co. Litt.* 298. a.

* But not by a fine *executed*. See 1. *Cru.* 62.

abſolute

abſolute fee in it: But if a rent be granted *de novo* to A. in tail *without a remainder over*, and A. ſuffer a recovery, he ſhall only acquire *a baſe fee determinable on failure of his iſſue.* because there cannot be a larger Estate in the Rent than was originally granted therein. For the rule is, "Modus et Conventio vincunt legem".

PRIN-

Rents, properly so called, admit of apportionmt. according to any partial disposition of the lands out of which they issue; Rents-charge do not; for if the owner of the Rent release any part of the Land, it is in law a discharge of the whole. They may of course be made apportionable by the agreement of the parties. It seems — proper, therefore, in deeds creating → rent charges, where the estates subject to the rent charge are all limited to the same uses to give the Rentee power to release part or to apportion the charge.

PRINCIPLES

OF

CONVEYANCING, &c.

BOOK II.

OF CONVEYANCES AS THEY RELATE TO ESTATES.

CHAP. I.

OF A FEOFFMENT.

A Feoffment is a conveyance which operates by *tranſmutation of poſſeſsion* : it is eſſential to its completion that the *ſeiſin** be paſſed. Hence it can only be adopted in caſes where the ſeiſin may be, and is actually to be, conveyed ; as in the transfer of eſtates of *freehold in poſſeſsion*. In the transfer of *chattel intereſts* there is no ſeiſin to be conveyed, as the ſeiſin remains

2. *Bl. Comm.* 310. *Touchſt.* 203. *But. n.* (1) to *Co. Litt.* 271, b. *Sand. Uſes*, 268.

* Of Livery. See *Watk.* N. XXIX. to *Gilb. Ten.*

in

in the freeholder: hence a term of years cannot be conveyed by feoffment.(a) In the transfer of *reverſions* or *remainders* on a freehold, the actual or corporal ſeiſin is not concerned, as it continues in the particular tenants: Hence they cannot paſs by feoffment, but by *grant*. So of *equitable intereſts*, &c.(b)

Hence, too, feoffments can only be made by a perſon *in the actual ſeiſin* to a perſon who is *not in the actual ſeiſin:* and, therefore, *one joint tenant cannot enfeoff his companion*, becauſe *his companion* has the ſeiſin already; each joint tenant being ſeized *per mie et per tout*. But, as *tenants in common* and *coparceners*, as to ſome purpoſes, have ſeveral freeholds, they *may*(c) enfeoff their companions of their reſpective ſhares.

Gilb. Ten. 72.

But a feoffment by a perſon having no right of property in the lands is good, becauſe the moment he enters to give ſeiſin he gains the fee ſimple in poſſeſſion by wrong.(d)

See 1. Burr. 92.

But perhaps the entry to make livery is not an entry for all purposes; for Perkins Sect 157 says that if Disseisor and Disseisee join in a feoffment & livery, it shall be the feoffment of the former when if it were a constructive entry by the latter it would purge the Disseisin. Sect 2n. as to this.

(a) But it may be created by Feoffmt. Thus a feoffmt may be made to a for years, with rem: over, and in that case the Livery may be made to the Termor.

(b) But in all these instances, an assurance in the form and with the ceremony of a feoffment will operate as a Grant. (A)

(c) The seisin and title of Tenants in common is so perfectly distinct that one of them cannot release to the other. There must be a feoffmt. or other Convey^ce from one to the other.

Coparceners to some purposes have a unity of Title & an entire seisin. And one of them may either enfeoff the other a release to him. And the Release of a Coparcener a Joint-tenant generally speaking as an Extinguishment of Title. In some instances however it operates as a Conveyance. And therefore a Release by one of 3 Joint tenants or Coparceners to another of them gives the share of the releasing party to the releasee exclusively. In releases of right the construction of law is different; for a release of right to one of 2 Coparceners a Joint tenants is a release to both. Coke Litt. 194. a & B.

(d) In Mettafords cases 9 Syer 362. (b) the Court held the feoffmt. of a Termor to be good tho' the rev^r was on the land at the time, and saying nothing against it according to Read & Errington Cro. Eliz. 322. 9 Syer fo 362. it seems the objects of the Rev: to the feoffmt. would not prevent its operation. The remedy of the Rev: is by entry for the forfeiture.

(A) As to one species of convey^ce operating for another. See Chester v Willan 2 Saunders 96 with Williams's note.

(a) Of entry &c immediately & mediately in some cases, (as by descents which toll entries) into rights of action; and after a Disseisin, there is no transferable or devisable Estate in the Disseisee tho' he may release or confirm.

(b) with proclam.ns

(c) This is very correctly put. It is a rule that to give operation to a fine, the Conuzor must have an estate of freehold at the time of levying it. But a fine by a part.r Tenant or a remr man or rev.r will operate for the benefit of all persons who are privy in Est.: Cruk Cent 254.

(d) And to avoid a fine by the Statute with proclam.ns there must be an actual entry on the land for the express & declared purpose of avoiding the fine Doe v Watts 9 East. 17

(e) and also to receive seisin, for as a Corporation has no natural capacity or existence Livery cannot be made by or to the same.
This is applicable only to Corpor.ns aggregate Mr. P. apprehends sole Corpor.rs (as Parsons — Vicars &c) may make or deliver seisin in person even in their corporate capacity

(f) For an instant, so that there may be a seisin to serve the use.

(g) By person in this passage seisin is to be understood

By 8 & 9 Will. c. 106. Mariners &c. shall not have any Estates of Freehold or Inheritance &c. unless made by Deed &c. 2

This mode of conveyance is, in many instances, the most advisable, as it clears all disseisins, &c. and turns all other estates into rights,(a) so that a fine,(b) levied by the feoffor to the feoffee, or by the feoffee to a stranger,(c) will bar them, if not avoided within the time prescribed by the statute.(d) *Touchst.* 203. See 2. *Bl. Comm.* 357. 1 *Salk.* 340, & N. (b). 2 *Lev.* 52.

The giving of livery, indeed, is often attended with inconvenience and expence when the feoffor resides at a distance from the lands: but this may be easily prevented by executing a power of attorney: and we may remember that corporations must always make attornies, under their common seal, to deliver seisin.(e)

A feoffment therefore is incompatible with any conveyance operating by way of use. A feoffment and bargain and sale cannot be made by the same person, of the same lands, at the same time; for the feoffment conveys the seisin or possession to the feoffee, while it is absolutely essential to the efficacy of a bargain and sale that it remain in the bargainor.(f) Now the possession(g) cannot be in,

and not in, the feoffor at the ſame time. If the feoffment take effect, the poſſeſſion *muſt be out of him* by the very act of livery; and if the poſſeſsion *be out of him*, he cannot be ſeized to the uſe of the bargainee. A bargain-and-ſale is a contract to convey, and not an abſolute conveyance as a feoffment. A perſon cannot contract to ſell what he has actually parted with. If he conveys the poſſeſsion to another he can have none in himſelf to ſupply the uſe.

2 *Bl. Comm.* 300. *Gilb. Ten.* 133, & *Watk.* n. LIV.

A clauſe of *warranty* (a) is uſually added to a feoffment; but it is preferable to inſert a covenant by the feoffor, "for himſelf, his heirs, executors, and adminiſtrators," as the warranty only binds the *heirs having aſſets*. Yet it may be ſometimes prudent to inſert a clauſe of warranty in addition to the covenants, as it may poſsibly bind a reverſioner or remainder-man when no aſſets deſcend,—and be even a bar to a latent entail.

CHAP.

(2) A Title depending on a warranty is not to be considered as a marketable Title. The warranty merely binds the person, not the estate a title: & therefore tho' the warranty is a Bar to the present heir a claimant it will not necessarily be so to the next claimant a heir. This is more especially the case in those instances in which the bar of the warranty depends on a descent of assets to the heir.

Warranty is either lineal a collateral & a lineal warranty binds with assets A Collateral warranty binds without assets.

(a) But tho' an estate in rev.n a rem.r in corp.l hereds will pass by grant, yet the common & ordinary mode of transferring revers & rem.rs is by lease & release; & it is not prudent to depart from this practice.

It shortens the proof of Title because the Lease for a year supersedes the necess.y of establish.g the fact that the Lands were held for an est. in rev.n or rem.r besides it provides for the event that there is in fact no est. in rem.r or rev.n but merely an est. in poss.n.

On the subject of the sufficiency of a grant to pass an estate of freehold &c in a rent or to pass the rev.n or rem.r of Lands Mr. Fearne seems to have fallen into a very unaccountable mistake. See

(b) It is the only efficient part of the convey.ce and the feoffm.t is only evidence of the Grant or alienation. This accounts for the form of the words of the Grant in the past as well as the present tense. Formerly the livery was made in the 1.st instance hence the words "Hath granted &c" in the charter of Feoffm.t. and also the words "Doth grant & confirm." which were calculated to operate as a confirm.n on the livery. See notes in Mr. Butlers practical notes

---

as the livery is the efficient part of a feoffment & a deed the efficient part of a Grant there is this distinction betw.n them. viz A Feoffm.t to A. and his heirs to hold from and after next Michas is good, if livery is made after Michas; because since the feoffm.t does not take effect till livery the freehold is never in abeyance.

But a Grant to hold to A and his heirs from and after next Michas is not

turn over. &c Good

CHAP. II.

OF A GRANT.

A Grant is appropriated to the conveyance of things *not in poſſeſſion*, as reverſions and remainders, and other incorporeal hereditaments, as rents, advowſons, &c. of which no livery can, of courſe, be given. Hence the law divided eſtates into thoſe which lay in *livery* and thoſe *in grant*.(a)

2 *Bl. Comm.* 317. *Touchſt.* 228. *Butl.* n. (1) to *Co. Litt.* 384. a. *Sand. Uſes.* 327.

As livery of feiſin was a matter of notoriety, it was eſſential to the transfer of whatever that livery could be made. It was, indeed, of itſelf, ſufficient to effectuate ſuch transfer;(b) and no farther evidence of the conveyance was required than the evidence of ſuch livery. But, as livery could not be made of incorporeal hereditaments, intereſts, or rights, the law, even before the ſtatute

of frauds, required the transfer of them to be in writing under ſeal. In many
Gilb. Ten. 81. caſes alſo, it ordained that *attornment* ſhould be made; as in the conveyance of a reverſion or a ſeigniory; and that for the following reaſons:

1ſt, That the tenant in poſſeſſion might not be ſubjected to a ſtranger, or a new lord, without his own approbation and conſent.

2dly, That he might know to whom he was to render his ſervices, and diſtinguiſh the lawful diſtreſs from the tortious taking of his cattle.

3dly, That by ſuch attornment the grantee of the reverſion or ſeigniory might be put into the poſſeſſion of it, and that others might be apprized and informed of the transfer.

The reaſons, however, for attornment having, in a great meaſure, ceaſed from the change of manners, and the decline of

good. because the Grant must take effect immediately if at all. And as it would place the freehold in abeyance, if it operated, it is void.

By Statute 8 & 9 Vict: c 106 all Corporeal Tenants & hereditaments shall as regards the Conveyance of the immediate freehold be deemed to lie in Grant as well as in livery.

(a) But any words which shew an intent to pass the lands, as the word "alien" or the words "limit and appoint" 5 Rep 124] will have the same effect

The word "grant" is of universal extent and will operate in anyway to effect the intention of the party: as a feoffment if there is livery: as a release if the Grantee has an immediate particular estate: as a Bargain and Sale, if there is a valuable consideration: as a Covt to stand seised, if there is a consideration of Blood. [Chester v Willan 2 Saun 96 a. & Shore & Pike 5 Tenn Rep. as an appointment where there is a power & the requisites are complied with.

of feudal principles, attornment is now rendered unneceſſary to the completion of a grant. *Stat. 4. Anne C. 16. S. 9, 10,—& 11. Geo. 2. C. 19. S. 11.*

The operative word in this ſpecies of conveyance is "grant." (a)

CHAP. III.

OF A GIFT. (a)

2. *Bl. Comm.* 316. *Touchſt.* 227. A Gift is, properly, a *voluntary convey-ance*; that is, a conveyance *not founded on the conſideration of money or blood.*

See 13. *Vin.* 519. Fraud. 22 *Vin.* 15. Voluntary Convey.

The operative word in it is "*given.*" It is, at this day, a ſuſpicious ſpecies of conveyance, as being without what the law denominates either a good or valuable conſideration. It is void as to thoſe who were creditors of the donor at the time of it's being made, though valid as to ſubſequent creditors. If it be of an eſtate in poſſeſſion, it requires livery to perfect it: For, as it has no conſideration either of blood or money, no uſe ariſes on it; and, conſequently, livery is ſtill neceſſary.

(a) a Gift can hardly be considered as a species of Convey.ce It is rather the effect or consn of the convey.ce which gives denom.n to the asurance and a Transfer. Grant &c. are equally gifts when they are gratuitous In this respect Gift and Settlem.t are of the like nature. Neither of them implies any determinate Form of asurance It merely expresses the nature of the transaction.

(a) Whether that Est: arises from a mere gratuitous donation or a consideration is paid for it.

(A) A Power is also said to be given, and the person to whom it is given is called the Donee, and this is so whether the power be in fact reserved or limited with or without consideration.

Originally feoffments were conſidered as gifts. The term Gift now, however, is generally appropriated to the creation of an *eſtate tail*: hence the perſon creating an eſtate tail is denominated the *donor*, and the perſon taking it the *donee*: hence the iſſue of a tenant in tail is ſaid to take *per formam doni*, and the writ given him to recover his eſtate is called the *formedon*. 2. *Bl. Comm.* 310. *F. N. B.* 211, 212.

CHAP. IV.

OF A LEASE.

2. *Bl. Comm.* 317. *Touchſt.* Ch. 14. *Bacon on Leaſes, & Ante* b. 1. c. 2.

A Leaſe is the grant of the poſſeſsion (a) of lands, or other things, to a perſon for *life*, *years*, or *at will*.

On a leaſe for life, (b) as it goes to the feiſin as well as to the poſſeſsion, livery muſt be made, as on a feoffment; unleſs it be created by way of uſe, or deviſe. A leaſe for *life*, therefore, is a *freehold* intereſt, and muſt be paſſed by livery, &c. as any other eſtate of freehold. But a leaſe for *years*, paſsing only the right of *poſſeſsion* as contradiſtinguiſhed from the *ſeiſin*, is completed by *the entry of the leſsee*; for even *before* the entry, an *intereſt* paſſes to him (called his *intereſse termini*) which the leſſor cannot reſcind.

Litt. S. 459. *Co. Litt.* 270. *Before entry*, however, the leſſee cannot bring

(a) Not necessarily tho' most commonly the grant of the possn. For there may be a lease of the Revn. The defin: will be more correct if the words "of the Possion" are omitted.

Strictly speaking indeed Mr. Watkins is correct and according to his distinctionable apurances which create Estates for life or for years &c of the revn or remn of lands are to be denominated Grants. But in practice the term Lease is applied indiscriminately to grants of the revn &c as well as to grants of the possion.

(b) Of Lands in possn; for if the revn or remn is leased for an estate of freehold Livery is not requisite

2ly If a lease is not rather the effect than the form of the apurance? For instance a Bargain & Sale for a year is a Lease for a year. The bargain & Sale a Grant is the form. The result in effect is a lease for a year tho' that mediu

(a) In the mean time he has no Est: he has merely an Int or Right to have the Term. This Int: may be
released
transferred or
devised.

(b) and so as 2/3: of the improved value shall be reserved by way of Rent.

(c) and the better opinion now is that a Lease by parol for more than 3 Years is not good even for the 3 Years. But the Lessee taking possn under such a Lease becomes a Tenant from year to year, as soon as there is any act by the Lessor recognizing his tenancy.

X A covenant should be inserted for paymt. of the rent; as the Lease, if once assigned, might be assigned to a succession of Beggars. 2: Edit: (A)

(A) But, under circumstances, a court of equity would relieve against such an assignment: this: not a General Equity See Philpot v Hoare 2 Atk 219. 524. 546, & 592.

⊖ There should be also inserted a provision for reentry, on non-paymt: of rent, to guard against the event of the Lands being uncultivated or without sufficient distress. For though the Statute of the 2 Geo. II. c19. s.16. gives a remedy in the latter case, yet it would be adviseable to empower the Lessor to enter without being obliged to pursue the directions of that act.

bring an action of treſpaſs; nor is he, till entry, if he takes at common law, and not by way of uſe, capable of receiving a *releaſe of the reverſion.*(a)

A leaſe for a chattel intereſt is ſtill good by parol, ſo it exceed not three years from the making; but, if it be for a longer term, or for an eſtate of freehold, it muſt be by deed or note in writing, ſigned according to the ſtatute of frauds.(c) 29 *Car.* 2. *C.* 3.

A leaſe is uſually and properly in conſideration of a yearly rent; and the beſt way of reſerving ſuch rent is to reſerve it generally, as "yielding and paying, therefore, yearly, during the ſaid term, the ſum, &c." as the rent ſhall follow the reverſion. See *Ante* b. 1. c. 22. (of rents).

A leaſe may be *aſsigned*; that is, the *whole intereſt of the leſsee* may be conveyed to another; or the leſſee may *underlet*, that is, convey for *a leſs term* than he himſelf has in the lands. If, therefore, it is intended, that he ſhall not do ſo, an expreſs proviſion 2. *Bl. Comm.* 326, 7. *Dougl.* 187. N. (*) 59. Palmer *v.* Edwards. 1. *Str.* 405, Poultney *v.* Holmes. *Dr. & Stud.* 1 *Dial.* 1. *c.* 8.

2. *Stra.* 1221. Lekeux *v.* Nash.

provision or covenant should be inserted to restrain him. But this covenant does not come within what the law denominates the *usual covenants**.

* 3 *Bro. C. C.* 632. Henderson *v.* Hay.

[3 Ansh. 700. Tolkingham r croft. See also church & brown B. Ves. Jr. contra accord. to which the point is now settled.]

Again, a lessor is not obliged to renew the lease (unless by custom)(a); and, therefore, if it be intended that the lessor shall be compelled to do so, a covenant for that purpose should be also inserted.

2. *Bro. C. C.* 636. Tritton *v.* Foot. 3 *Ves. Jun.* 295. Baynham *v.* Guy's Hosp.

But if the lessor covenant to renew under "*the like covenants*," it will not extend to a further covenant for renewal. (A)

Co. Litt. 53. a.

A lessee for years is compellable to repair, &c.(c) and, therefore, if it be not intended that he should do so, a covenant from the lessor should be inserted.(B)

The operative words in a lease are "*demise, lease, and to farm lett.*"

2. *Bl. Comm.* 319, &c. *Touchst.* 280, &c. *Bac. on Leases*, &c.

See *Ante*, book 1. ch. 2. of terms for years. And as to leases by husband and wife of the wife's lands, ecclesiastical persons, corporations, guardians, &c. the books cited in the margin.

The most comprehensive Treatise on Leases is the article in Bacons Abr which is by C. B. Gilbert.

CHAP.

(a) q. any instance of a custom except as to Copyholds Lands. On renewal under customs See Whalton v. King Anstr.

(b) On the construction of Covt. for renewal. See Hargraves Juridical Arguments Vol 1 The arguments in Chandos Cases Bacon's abridgmt. by Gwillim Leases (U)

(c) he is liable to an action of waste if waste is committed for want of repairs

(A) Acc. Iggulden v. May 7 East 237. 9 Ves. Jr. 325. 2 New Rep. 449.

(B) But in practice it is usual to insert a Covt. from the Lessee to repair with an except. against damage by fire, as to which it is common to add a Covt. to insure, and in case of accident to lay out the insurance Money in restoring the premises

The most common Covts. in Leases on the part of the Lessee are as follows.

1 To pay rent
2 To pay taxes
3 To keep in repair
4 To leave the premes in repr: to the end of the term, & to leave all fixtures &c (See Elias v. Mann 3 East 89.
5) To permit the lessor to enter to see the state of the premes & to give notice of repairs wanted
6 To insure; and in case of accident lay out the insce Money in repg. &c
7. Not to permit offensive Trades.
8. If there is land the Covt. for regular the course of husbandry;
9 a Covt. not to assign a underlet without license
10 The power for reentry.

(a) as an estate for life for an estate for life
of Inheritance for an est: of Inhance.
a chattel Interest for a chattel Interest

(b) q. only when the estate was in poſſon, for if the est: was in reversion or rem: it shd seem that attornment, not entry was requisite to the perfection of the exchange.

(c) But if it is true that a Corpor: can give an use tho' they cannot stand seized to an use, then a Corpor: may make an exchange by Lease & Release; but the gen: practice is for corpor: to convey Land so in poſſon by Feoffmt: & therefore it would not be safe to rely on a deed of exchange from them by Lease & Release without actual entry.

But if there should be a Lease and Release, tho' the Release might not operate as a Release — because the Lease for a year did not give a vested int: by means of the Stat: of Uses No doubt can be entertained but that the release would operate as a deed of exchange by way of Grant independent of a Lease for a Year

(d) By giving a vested interest before entry as an exchange is a Common Law Convey: it sh: seem a use may be declared upon the seisin of the exchange: since the use is no part of the form of the exchange, nor does it interfere with the incidents of an exchange; nor as far as the exchange is concerned, is the exchange in point of law, between more than 2 parties

CHAP. V.

OF AN EXCHANGE.

AN Exchange is a *mutual* grant of *equal intereſts*,(a) the one in conſideration of the other. No livery was neceſſary on an exchange at common law; but entry by each party was abſolutely neceſſary to effectuate it. 2 *Bl. Comm.* 323. *Touchſt.* C. 16. *Co. Litt.* 50. b. *Perk.* S. 285.

If both parties die before entry, the exchange is void; and if one die, his heir may avoid it. Hence the beſt mode of exchange (except as to corporate bodies, or others who cannot ſtand ſeized to an uſe,(a) is to procure reciprocal conveyances founded on the ſtatute of uſes, as by leaſe and releaſe; which does away the neceſſity of entry.(d) *Butl.* n. (1.) to *Co. Litt.* 271. b. S. 3.

An

3. *Wilf.* 483. *Hargr.* n. (1) to *Co. Litt.* 50. b.

An exchange can only be between *two parties*, though the *number of perſons* is immaterial. The word "*exchange*" is the only operative word, and therefore indiſpenſible, and it implies a *mutual warranty.(e)*

CHAP.

(a) Thus A. cannot give Lands to B. in exchange for lands conveyed, a to be conveyed by B. to C. So if 3 persons exchange Lands thus A. gives to B. in exchange for Lands which C. gives to A. B giving Lands to C. This Exchange is void as an exchange.

But if a Tenant for life with rem: to B in fee exchange with C. Tenant in fee: or if 2 Joint Tenants exchange with a sole Tenant the Exchanges are good. Between 3 There should be a Conveyance to Uses. (A)

(A) It follows from the above rule that if A & B wish to exchange and A's land is vested in a Trustee in fee; in order to make the transaction good as an exchange at Common law B must convey to A's Trustee & cannot convey directly to A. himself

CHAP. VI.

OF A RELEASE.

A RELEASE is the relinquiſhment of a right or intereſt in lands or tenements to another who has an eſtate *in poſſeſsion* in the ſame lands or tenements. 2 *Bl. Comm.* 324. *Gilb. Ten.* 53. *Touchſt.* c. 19. p. 320. *Litt. Ch.* 8. ſ. 444, &c.

There are five ſpecies of releaſe: 1ſt, *by way of enlargement*; as if he in remainder in fee releaſe to the particular tenant in poſſeſsion. 2dly, *By way of paſsing an eſtate*; as when one coparcener or joint-tenant releaſes to the other. 3dly, *By way of paſsing a right*; as when a diſſeiſſee releaſes to the diſſeiſſor. 4thly, *By way of extinguiſhment*; as if my tenant for life makes a greater eſtate than he is warranted in granting, and I releaſe to his grantee; or if the lord releaſe to his tenant his ſeigni-

ſeigniorial rights. And 5thly, *By way of entry and feoffment*; as when a diſſeiſſee releaſes to one of two diſſeiſſors.(a)

But, in order to give operation to a releaſe, it is neceſſary that the releaſee have the ſeiſin, or at leaſt poſſeſsion, of the premiſes, either by livery, by the ſtatute of uſes, or by actual entry; and, therefore, if any convey by leaſe and releaſe, who cannot ſtand ſeized to an uſe, as a corporation, the leaſe on which the releaſe is to be grounded muſt not be in the common way of bargain and ſale, but by way of demiſe and leaſe at common law, *with actual entry by the leſſee*.

Care muſt alſo be taken that the premiſes in the leaſe, or bargain and ſale, be at leaſt commenſurate with thoſe in the releaſe, as the releaſe is only of the right to, or eſtate in, the premiſes of which the releaſee is in actual poſſeſsion; and, conſequently, no more can paſs.

A releaſe is the proper mode of extinguiſhing or conveying a right to, or an (b) equity,

(a) But if a Disseisor makes a feoffment to two, & the Disseisee releases to one of them, this will enure to both of them Litt. S. 307. and 472.

So if Tenant for life is disseised by 2. and releases to one of them, this Release enures to both; Mr. Watkins' propos.n is applied to a Release by a Tenant in fee simple who is disseised Co. Litt 27. Litt: S. 472.

(b) an equitable estate a equitable possibility are the only species of these interests which can be conveyed: the others may be released or extinguished. There is no doubt of an equitable interest passing by any instrument which shews an intent of transferring it; even a Contract is sufficient; and where there was an equitable Entail; and the Trustees conveyed by the direction of the Cestuique Trust it was the opinion of several Gent.n that the direction alone amounted to a transfer of the equitable Int, so as to make a good tenant to the writ of entry for suffering an equitable Recovery.

(b) by way of extinguishment of right. The formal words in a release in enlargement of estate are.

(as to Trustees) Bargain sell & release
(as to owners) Grant Bargain sell & release. & confirm.

equity, or contingency, or poſsibility, in the lands of the releaſee.

The operative words in a *releaſe* (b) are, "*remiſe, releaſe, and for ever quit claim and diſcharge.*"

CHAP.

CHAP. VII.

OF A CONFIRMATION.(a)

2 *Bl. Comm.* 325. *Gilb. Ten.* 75. *Touchſt.* 311. *Litt.* ch. 9. ſ. 515, &c.

A CONFIRMATION differs eſſentially from a releaſe, as it only validates and eſtabliſhes that eſtate or intereſt which the tenant *already has*; whereas a releaſe is the relinquiſhment of a right which the tenant had not before. So far as the particular eſtate is *increaſed*, it is *not* a confirmation; it is not the *ſtrengthening of the tenant's eſtate*, but the *giving him a greater one*.

The operative words are, "*ratified and confirmed*;" though, from ſafety, it is uſual and prudent to inſert the words, "*given and granted*," alſo.

CHAP.

(a) There are 2 Species of Confirmations

1st One which confirms the estate in point of title

2. Another which enlarges an estate:

The first corresponds in some measure ~~with~~ tho' not in all respects, with a release in extinguishment of a right.

The second corresponds with a release in enlargement of an estate, hence the word "Confirm" is a common word of Grant used in a Release grounded on a lease for a year. The Rules which relate to Confirmations will be found in Co Litt: ch. Confirmations and Shep. Touchstone

The following rules relate to Confirmations in point of Title.

1st A Confirmation of a Remainder is a confirmation of the particular Estate.

2 a more immediate Estate may be confirmed without confirming a more remote one;

3. A Confirmation may be made for part of the lands but it cannot be made for part of an estate of freehold in the land. But a Confirmation may be for a given number of years, part of a Term of years without confirming the term generally. But if a Confirmation is made of the term a Estate, any words which attempt to confine the Confirmation to a given No of years will be repugnant and void.

(a) Whether, when Estates are equal, the owner of one of them may surr: to the other seems doubtful.

It is said Tenant pur autre vie cant surr: to Ten^t pur autre vie. Shepk 300] If this is true, it certainly proves the proposition in appl^n to that particular instance.

But Mr. Preston questions, whether the prop^n is correct in point of Law & the cases referred to in Shepk. do not warrant any conclus^n of this sort. It is agreed that Tenant for his own life may surr: to an: who is tenant for his own life This however is ascribed to a construction of law which esteems an estate to a man for his own life to be greater than an estate for the life of another person

and therefore the Tenant for the life of A can't surr: to A who is merely Tenant for the life of the Surrenderor or any other person.

But there is no doubt but one Termor may surr: to another, and Mr. P. inclines to think such Surr: will be good, altho' the Surrenderee has a term for fewer years than the Surrenderor [A] [See Hughes v Robotham. Cro Eliz^h 302]

(A) If therefore a Term for 1000 y^rs is to be conveyed to the person who has the immediate reversion tho' only for 20 y^rs the last day of the 1st term shou^d be reserved, or that term would merge leaving the 2^d term only in existence.

CHAP. VIII.

OF A SURRENDER.

A SURRENDER is the yielding up, or returning, or relinquiſhing, of *a ſmaller eſtate*, to him who has a *greater eſtate* in the ſame lands, in remainder or reverſion *immediately expectant upon ſuch ſmaller eſtate:* for if there be an eſtate to *A.* for life, remainder to *B.* for life, remainder to *C.* in fee, *A.* cannot ſurrender to *C. by reaſon of B.'s mediate or intervening eſtate.* If *A.* paſs his eſtate to *C.* it will *not be a ſurrender*, any more than if made to a ſtranger who had nothing in the lands. (a)

2 *Bl. Comm.* 326. *Touchſt.* ch. 17. p. 300.

As a ſurrender is, generally, for the advantage of the ſurrenderee, the law will often preſume his aſſent to it; for the particular tenant cannot enforce it upon him *nolens volens*, and ſo get rid of his obligations:

tions: but it is always prudent to make the ſurrenderee a party, and expreſs his conſent, that it may be apparent on the very face of the deed.

A ſurrender might have been by parol; but now, by the ſtatute of frauds, it muſt be by deed or note in writing.

Sand. Uſes. 369. The operative words in a ſurrender are, "*ſurrendered and yielded up*;" though they are uſually preceded by the word "*granted*." *

* The difference between a Surr: to extinguish an Est
& a release to enlarge one is.

A Surr: is an act proceeding from the partic.
Tenant to the rev: or rem: man.

A Release is an act proceeding from the Rev
or Rem: man to the partic. Tenant.

Merger differs from both in this instance,
a Merger is the conclusion of law on the union
the two estates without any regard to the
circs: which of them is an accession to the
other.

Therefore if the rem: man or rev: conveys to
the partic. Tenant, coeteris paribus, the
partic. Tenant Estate will be annihilated
by merger not by Surr: (a).

(a) But if the partic. Ten: had granted to
the Rem: Man or the Rev: this by
construction of Law would have been a Surr: not a
Grant.

Again if in the last instance there was any
intervening estate to prevent the operation of the deed
as a Surr: it would operate as a Grant & then on the
determ: of the intermediate Estate, the partic. Est
would merge.

The word "Release" will operate as a word of
Surr: unless it is the prevailing opinion that words
of Surr: which cannot operate in the mode of a
Surr: may coeteris paribus operate as a Covt to
stand seised.

In Surrs: of Terms the word "assign" is
generally used in addition to the word Surr: thus
in case there is any impediment to the deeds operating
as a Surr: it may take effect as an Assignment
vide Swann v Broome Cro Jac 619.

But for the same reason that the word Surr:
may operate as a Covt to stand seised it may
operate as an Assignment 1 Co: Litt. is to the
contrary.

(a) an apignment must necessarily embrace all the term & estate of the apignor.

On this account an apignment to hold from a future day is void, because till that day the Term wo: remain in the apignor.

Hence in Apignmts it is very improper to limit the estate by the habendum "from & after the day of the date" The word henceforth should be used; in there sh? not be any word marking the commencem: of the int:.

But if the party apigns all his estate To hold from a future day the Term will pass by the word "Estate" & the habendum will be rejected as repugnant.

An Underlease must leave the latter part not the former part only, of the beneficial ownership in the party. Sothat he may have a reversion

Any words which shew an intention to pass the property will amount to an apignmt. A Term will even pass by the word "Goods". So a Grant of the Lands without any limon will pass the lands for all the term.

The like of a Bequest. Tho' in some of the books, it is said a Grant generally will give the Grantee merely a Tenancy at Will. The better opinion however is that all the term will be granted.

CHAP. IX.

OF AN ASSIGNMENT.

AN Aſsignment is, properly, the transfer of one's whole intereſt in *any* eſtate; but it is now generally appropriated to the transfer of *chattels*, either real or perſonal, or of *equitable intereſts*. 2 *Bl. Comm.* 326.

An *aſsignment* of a term differs from an *under-leaſe*, in that the *former* is the parting with the *whole*, and the *latter* with *a portion only, of one's intereſt or eſtate*. *Ante*, b. 2. c. 4.

The operative words are, "*aſsigned, transferred, and ſet over*;" though uſually the word "granted" is inſerted; and, in the aſsignment of *chattels*, the words "*bargained and ſold*" alſo. (a)

CHAP. X.

OF A DEFEASANCE. (a)

2 *Bl. Comm.* 327. *Touchſt.* ch. 22. p. 396.

A DEFEASANCE is a collateral deed, made at the ſame time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the eſtate then created may be defeated or totally undone.

A defeaſance is now, however, ſeldom reſorted to, as it is much preferable to make the conditions apparent in the deed, ſo that the deed ſhall be complete in itſelf.

(a) Defeazances are of 2 Sorts
One applicable to freehold Estates
The other to terms and all executory Instrumts
In regard to freehold Estates the defeazance is merely a condon annexed to the estate on its creation. The defeazance must therefore be made at the same time, as the Feoffment the Grant &c and must form part of that transaction
But executory Instruments as Bonds Judgmts. &c and even terms of years may be defeated at any time. For instance if a Bond is given absolutely, it may afterwards be made condit[l] by a defeazance.(A) Or if given on a Condition, the Condon may be altered or varied by a defeazance

(A) Vide 2° Saunders 48. & Serjt. Williams note where all the distinctions on this subject are taken & all the authorities collected.

(a) a person who has an equitable estate may by an instt in the form of a Covt to stand seised transfer that estate. But the instrument will not operate legally as a Covt to stand seised for want of seisin in the Covenantor.

(b) In regard to the Covt of the Tent in tail to stand seised these distinctions are to be made.
If the covt to stand seised to the use of himself for life with remr over, the assurance is void and the use is not charged.
But if a Tent in tail covt to stand seised to the use of B in tail this use will arise, & the Covt will have a fee determinable on the failure of issue of the Covr and defeasible by them on the death of Tent in tail unless their right shall be bound by Fine.
So if Tenant in tail covt to stand seised to the use of A for life, remr to B, both estates will arise under the Covts Mich 6 Geo Clarke & Rayn 776

(c) For this reason Covts to stand seised do not admit of powers of leasing &c (A) generally tho' it seems they admit of powers in favor of the Covenantors kind? But whenever powers are to be given it is prudent to make a Conveyance to Uses

(d) ie for money alone. for even an instrument in the form of a release in consn of Covt will (if necessary to give effect to the intents of the parties) operate as a Covenant to stand seised

(A) But it seems that a power of revocation may be reserved to the Covenantor tho' not to any other person

CHAP. XI.

OF A COVENANT TO STAND SEIZED.

A COVENANT to ſtand ſeized to the uſe of another muſt be *by deed*; for a covenant cannot be by *parol*. It muſt be by a perſon *ſeized* of lands or tenements; and, conſequently, cannot embrace an equity, or right, or contingency, &c. though it may be of a *reverſion*, or *veſted remainder*; for the reverſioner or remainder-man *is in the ſeiſin*. It cannot be by a *corporation*; for a corporation cannot be ſeized to an uſe; or by a tenant in tail, except as to his own life. (b) It muſt be *in conſideration of marriage* or *blood*; for a covenant to ſtand ſeized *to the uſe of a ſtranger* would be void. (a) It muſt *not* be in conſideration *of money*; (c) for that would be a bargain and ſale. But it is not neceſſary that the conſideration

2 *Bl. Comm.* 338. *Touchſt.* 511, 512. *Sand. Uſes.* 556. See alſo *Com. Dig. Cov.* (G.)

ſideration of blood be *expreſſed*; the naming the covenantee or *ceſtui qui uſe* as the *wife, ſon*, &c. of the covenantor, is enough. (a) A perſon may covenant to ſtand ſeized to an uſe *in futuro*, as from Chriſtmas next; (b) or, if he be ſeized in fee-ſimple, that his heirs ſhall ſtand ſeized after his deceaſe. (c)

The proper word is "covenant;" but other words may be tantamount; as, if a perſon "*bargain and ſell*" in conſideration of *blood* or *marriage*, (d) it will be good *as a covenant to ſtand ſeized*.

As ſoon as the uſe is raiſed, it is executed by the ſtatute without any enrollment, though the uſe be in fee.

CHAP.

(a) and it seems sufficient that there is a relation of blood, tho' that does not appear on the deed; for it may be averred.

(b) or after the death of a particular person, as in Roe v Trammer Willes 602. or of the Covenantor, unless Tenant in tail. Ibid & Machil v Clark, ubi supra

(c) But the Covt. must be on the part of the Covenantor & his heirs that his heirs &c shall stand seised; for unless the Ancestor is bound, there can be no obligation on his heirs.

This however is not the general Rule in Cts of equity, for in such a Court it is sufficient that there is a contract for a Good and valuable Consn

(d) or if a man in consn of nat. love & affection & of 100£ grant release and confirm 1 Willes 682.

(e). But if a person covts to stand seised to a future use, and before the use vests he alienes for a valuable consn, & without notice, the use will be defeated.

To the Cestuique use may release, tho he cannot convey. If a man covts to stand seised to the use of A, after next Michas or the death of B. the fee remains in him in the mean time.

But if he covts to stand seised to the use of the heirs of his body, he has an estate for life by implication. & that estate will unite with the limitn to the use of the heirs of his body & he will have an estate tail. Pybus v Mitford. 1 Vent. Repts 372.

(a) or money's worth as a House Rent &c

(b) For there cannot be any averment as bet. the parties contrary to the Language of the deed. But if a consn is given it may be averred — tho' it is not expressed in the deed

(c) within 6 Months (viz Lunar Months) 27 Hen 8. 16.

(d) namely a Feoffment. Lease & Release &c And if the Convey^ce is by Lease & Release, the Lessee, tho' if the land be in poss^n, enter by virtue of the — lease before he accepts a release.

Upon the distinction that a Corp^n may give a Use, tho' they cannot be seised to an Use, it has been held that their bargain and Sale is an effectual Assurance.

*2^d edit^n. It has been already observed that an use cannot be limited on a Bargain and Sale to any but the bargainee.

a. But any Words of alienation will have the same effect if the deed be enrolled.

N.B. A Bargain & Sale must be by Indenture & inroll^d within 6 Lunar Months.

It does not admit of any use to be decl^d of the est^e of the Bargainee; But if he is Tenant to the Writ of Entry for suffering a recovery, Uses may be declared of the Seisin of the Recoveror, tho' such Uses are cont^d in the bargain & Sale.

In the Uses are not in this case to arise on the seisin of the bargainee.

A Bargain and Sale may be made on Condn a Rent may be reserved on it.

It seems to admit of Remx^rs & also of shifting Uses. So as such Uses are declared of the — seisin of the Bargainor. A Sect 9^a

It does not admit of powers.

A. These observations apply to a Bargain & Sale operating as such at Comm: Law. In cases where this mode of Convey^ce is directed by Stat: as a means of conveying Parlm^t property, the deed has no peculiar operation x

CHAP. XII.

OF A BARGAIN AND SALE.

A BARGAIN and Sale differs from the covenant to ſtand ſeized, as it muſt be in *conſideration of money*,(a) though that conſideration be only nominal.(b) If the uſe to be raiſed by it be for *a freehold intereſt*, it muſt be *enrolled*.(c) In this, as in the laſt ſpecies of conveyance, there muſt be *a perſon to ſtand ſeized*; and, therefore, in the caſe of a corporation, ſome other mode ſhould be adopted.(d) There muſt be *an eſtate* in him of which he has the *ſeiſin*, as an *eſtate of freehold in poſſeſſion, reverſion, or remainder*; not a *mere right, contingency, or poſſibility*; and there muſt be a *perſon capable of taking the uſe*. *

2 Bl. Comm. 338. Touchſt. c. 10. p. 221. Sand. Uſes. 404

The operative words are, "*bargained and ſold*."(e) 2 Mod. 250

* and uses may be declared on it this happens in sales under the land tax redemption acts: and also in cases where Comm^rs of Bankrupts convey part of a Bankrupt's estate to a purchaser without the intervention of a trust. Instances of this last kind are not common.

CHAP. XIII.

OF A LEASE AND RELEASE.

2 *Bl. Comm.* 339. *Sand. Uſes.* 461. *Butl.* n. (1) *Co. Litt.* 271. b.

WE have already remarked, that a releaſe can only be made to a perſon in the poſſeſsion or ſeiſin of the lands; and, therefore, if a conveyance of the freehold is intended to be made to a ſtranger, without the formalities of livery, an eſtate for a year, or other definite time, may be made to him in order to give him ſuch poſſeſsion or ſeiſin, and ſo make him capable of receiving a releaſe. This may be done by a conveyance at common law, or under the ſtatute of uſes.

If an eſtate for a year be granted at common law, the leſſee ſhould make *an actual*

1) See ante. p. 107. that they may give an use.

2) Tho' a peppercorn only is reserved by way of rent, this is such a consideration as will raise an use [2 Mod. 249 Barker v Keate]

3) But it must be remembered that when a party is seised of an Estate in reversion or remainder he may pass that Estate by grant without a Lease

Mr. Fearne seems by some means very inaccountably to have been surprised into an error on this point. See Poth.r Works.

But tho' a Grant is sufficient it is highly expedient for the reasons already assigned to convey even estates in Rev.n or Rem.r by Lease and Release Ante p 60.

And when a Conveyance was made by Lease and Release and there was an attendant term & the Release was executed prior to the Lease Mr. Fearne was of opinion that the Release was an effectual assurance. He ascribed to it the effect of a Grant.

4) If a rent is reserved, a Use will arise tho' there is not any pecuniary consn. Barker v Keate 2 Mod 249 A Lease & Release is the usual & ordinary mode of conveying Estates of Inheritance, as every modification of Est by limitn, by power &c may be introduced into the Release. As no Inrolment, Livery of Seisin or Entry is requisite it is particularly adapted to be the only mode of transacting busineſs, which is in these times consistent with public Convenience.

actual entry into the lands before the releaſe be made to him; and this ſhould always be done when a corporation is the grantor, as a corporation cannot be ſeized to an uſe.(a) If, however, the grantor can ſtand ſeized to an uſe, he may, to avoid the trouble of an actual entry by the grantee, make a bargain and ſale, in conſideration of money (though for a nominal ſum only, as for 5*s.* which is never intended to be paid), to the purchaſer for a year: an uſe then ariſes which the ſtatute immediately executes without enrollment; and, when the purchaſer is thus in poſſeſſion or ſeiſin (for a bargain and ſale may be made as well of a reverſion or veſted remainder as of an eſtate of freehold in poſſeſſion), a releaſe may be made to him. (c)

Butl. n. (3) to *Co. Litt.* 270. a.

The proper words in the inſtrument on which the releaſe is to be grounded are, if the inſtrument is intended to operate *as a leaſe with entry*, " *demiſed, leaſed, and to farm letten*;" if otherwiſe, " *bargained* and *ſold*." 2 *Mod.* 252. (d)

In

In the former caſe, a rent ſhould be reſerved, though it be a nominal one only; as a pepper-corn, if demanded. In the latter caſe, the reſervation is not material, as the conſideration of 5s. is ſufficient to raiſe the uſe.

CHAP.

(a) either by giving the prest. estate a bind. the ownership
(b) In some cases it has been held that an Instrument in the form of a deed may operate as a Will; but then the instrument is a will not a deed [Halsenham v Vincent 2 Ves. Jr. 662.]
(c) as by cancellation, revocation, obliteration, and a Will which is revoked, cannot operate with. republn
(d) As by making another Will inconsistent, alter. in Circs as marr. & the birth of a Child, subseq. to the publicn of a Will. (A) Alteration of Est. quoad the fee) subseq. to the date of the Will, a Lease to the Devisee to take effect at the same time that the devise was to have taken effect. And here it may be observed that a Will, which is revoked by the publication, merely, of another Will, —, will be restored to effect, by the cancellation of the 2. Will.

The revocation by marriage &c is merely — Constructive & depends on the presumed intention & parol evidence is admissible to explain the intention. 2 Sec Note (A)
The alteration must be of the fee, for a lease for yrs, or for life or a gift in tail is only a revoc. pro tanto. So in equity a Mortgage tho' in fee is only a revoc. pro tanto. & so is the change of an equitable into a legal Fee, by accepts. a Conveyce of the legal Estate from the Trustee thereof, a revoc. in equity: But a Settlement to Uses or any Conveyce which takes the inheritance (except a Conveyance made to give effect to a partition and where the devisor takes the exact same Estate in the divided as he had in the undivided share [See Lores. Jr. will be a revoc. tho' the fee results to the testor or is expressly decl. in his favour. And a deed which shews an intention to convey, tho' it does not amount to a Conveyce for some defect in form will be a revocation.
(e) a Will is always to be construed with refer. to the time at which it was made, but to some purposes as to pass after purchased Lands, the will relates to the time of republication

CHAP. XIV.

OF A DEVISE.

SUCH are the principal instruments of conveyance which are amicable and not forensic, and to take effect in the maker's life-time;(a) what we are now to speak of is a voluntary conveyance, but not to take effect till the maker's death.(b) Till that time it may be altered or revoked, either expressly(c) or by implication.(d) It is, as the law terms it, *ambulatory* till the testator's decease. Though it does not receive its consummation till the death of the testator, yet it shall relate, as to some purposes, to the time of its being made.(e)

2 *Bl. Comm.* 373. *Powell on Devises. Touchst.* c. 23. p. 399. &c.

It cannot embrace any freehold property which was not in the testator at the time of its publication. If the testator,

(A) vide Christopher v. Christ. 1 Dick. there-
Dr. v. Lancashire 5 Term rep. 49. Kenebel v. Scrafton
2 East 544. and wms. note on 1st. Saunders 278

therefore, afterwards purchaſe lands, or do any act which might be conſtrued into a revocation of ſuch will, care ſhould be taken to have it republiſhed.(a)

The ſame ſtrictneſs of expreſsion is not of neceſsity in wills as in deeds, with reſpect to limitations, &c. but, in the making of wills, too much care cannot be taken in purſuing thoſe deſcriptions which the law has given, and in uſing technical terms in a technical ſenſe.

Statute of Frauds, 29 *Car.* II. *c.* 3.

A deviſe of freehold lands need not be under *ſeal* as a deed, but muſt be in writing, and ſigned by the party deviſing, or ſome other perſon in his preſence and by his expreſs directions, and atteſted and ſubſcribed, in the preſence of the deviſor, by three or four credible witneſſes.

CHAP.

(a) Care should be taken also that the Will contains words sufficient to pass the Lands. The effect of a republ.n is to adopt the language of the Will at the time of the republication.

And therefore, if the Will devises all Lands & all real Estates, Lands purch.d subseq.t to the date of the Will & prior to republ.n will pass, unless there are any words which shew an int.n that those Lands only which are comprised in the Will shall pass; and for this purpose the Words "the said" with reference to the words of devise in the Will are sufficient [7 Term Rep.t 482. Thatchmore v Bower] and a republication can't restore to effect a devise which has failed; as if a devise be to A and his heirs & heirs of the body of A. dies, and the Will is republished the heirs shall not take by purchase because as the Will stands they were to take by descent. But, by an express devise, the heirs might have been made purchasers by name. But if a man devises all his Messuages &c & afterwards purchases Messuages in B. no republication of the Will can pass these purchased Lands for want of words of devise The purchased Lands must be expressly devised or devised by general words.

A Codicil annexed to a Will & attested by 3 Witnesses is impliedly a republication of the Will Barnes v Crowe 4 Bro. C.C 2.

A As to revocations and republications of Wills see Cave ex Holford 2. H.y Blackst. 376. 3 Ves. J.r 650. 1 Bos. & Pull 576.

(a) 163. 11 a Conuzee

(b) By precluding any possible claim in the party. And if a person who has a mere right or title levies a fine to a Stranger tho' it does not pass any interest, it operates by way of estoppel, & the pson in posson may set up this estoppel by way of protection to his estate. For the Conuzor of the fine cannot claim in opposition to his own fine; And the Conuzee cannot have any benefit of the fine, since the Conuzor had not an estate, but merely a right or Title which is not transferrable (A).

(c) Vid Hob. 333.

(d) This plea lies in defence to a title claimed thro' the medium of a fine, when the parties to the fine had no estate. It is now more generally used, in answer to a fine, pleaded as a Bar to a Claimant. And by this plea, if supported, the Plaintiff would have the bar of hon claim on the Fine. For if the Fine is void for want of proper parties, the proclam^ns are void also, & the fine can't be setup as a Bar.

(A) This is very doubtful. in Wms v Thomas 12 Cast 141. It came in question but was not decided

CHAP. XV.

OF A FINE.

A FINE is the compromiſe of a fictitious ſuit, and operates either by paſsing an intereſt,(a) or by way of eſtoppel.(b)

2 *Bl. Comm.* 348. *Touchſt.* c. 2. p. 2. *Cruiſe on Fines.* *Hargr.* n. 1. (C) to *Co. Litt.* 121. a.

In order to paſs an intereſt, the cognizor or cognizee muſt have an eſtate of *freehold* in the premiſes, either in poſſeſsion, remainder, or reverſion, or be *ceſtui que truſt* in tail or in fee; for, otherwiſe, a perſon not bound by eſtoppel(c) might vacate the fine by pleading *partes fines nihil habuerunt.* (d) But whether the freehold be in the cognizor or cognizee, either by right or by wrong, is of no conſequence; and hence, when a fine is to be levied in order to ſtrengthen a title, *a feoffment* may often be neceſſary, as the cognizor or cognizee

would then, at leaſt, have the freehold in him *by diſſeiſin.*(a)

If there be no intereſt in the perſon levying the fine, none can of conſequence paſs. The fine, in that caſe, if it operate at all, can only operate *by concluſion or eſtoppel.*

All *parties* to a fine, whether any intereſt paſs or not, are concluded, as every one ſhall be concluded by his own deliberate act.

Hob. 333. *Privies* (who are alſo eſtopped)(b) are either privies *in eſtate*, as the donor and donee; *in blood*, as the heir and anceſtor; or *in law*, as the lord and tenant, &c.

Strangers to a fine are all perſons who are neither parties nor privies.(c)

In order to bar an eſtate tail by fine, the privies muſt be privies *in eſtate*; that the iſſue be privies in blood only is not enough.(d) The iſſue, to be barred by a fine, muſt claim *the eſtate* from the perſon levying it,(e) or derive his title through him(f)

* note to the 2d edit.n – But if the feoffm.t be fraudulent the fine may be reversed. [See 3.Co. 78 in Fermor's case. Coup 694. & 1 Burr. 117.]

(a) And it is the common practice for a Tenor, who wishes to acquire the freehold, to make a feoffm.t & then levy a fine, first assigning the term to attend the inhance. It seems better that a Stranger should enter and make the feoffm.t and that the term being restored by entry, the tenor should make an assignement to attend the inhance and afterwards accept a convey.e of the inhance.

(b) M.r Pappr. apprehends the persons here distinguish'd as Privies in Est.: & in Law are not bound by estoppel.

(c). All persons (except those in the line of succession to the estate so as to be inheritable to the same) are (at least as to intails) Strangers & not privies Hob. 333.

(d) There must necessarily be a privity of blood & the person levying the fine & the person claiming as issue in tail must be within the scope of the intail, as Father & Son in cases of Est.s in tail general a Tail Male – Bro.r & Bro.r or Bro.r & Sister in cases of estates in tail gen.l

(e) As Donee & his issue &c. Hob. 333.

(f) By way of pedigree (as father, son &c.) or must be the issue in the line of Succession, after the Estate tail or right thereto has descended to the person who levied the fine or his issue; as in the case of the 2.nd of 3 Bros who levies a fine in the life time of the elder Bro.r & after dies the 2.d Bro.r or his issue survives the elder Bro.r or his issue (Hob. 332.) but dies in the life time of the 3.d Bro.r or his issue.

(a) as far as respects an est: tail Genl. a an Est: in fee simple: but secundum quoe she is not privy in blood, to him; for the privity required by the stat: is priv^t. of blood in respect of the estate tail. And therefore instead of saying that there must be privity of Blood & privity in Est^e the Correct mode of expressing the Law is that there must be privity of blood in respect of the estate tail. For instance if there is an estate to a Son in Tail Male with rem^r. to a Daur in tail female or to a Father in tail male rem^r. to him in tail female - In each of these cases there is, as between Son & Daur, privity of estate and Privity of Blood & yet the Fine of the Son will not bar the daur. But if the 2^d. Estate had been in tail genl. then as there is privity of blood in respect of that estate, the fine of the Son, coeteris paribus, will bar the Daur. Hob. 332.

(b) This proposition is mistaken. For unless the Son or his ipsue shall survive the father, tho' there is privity of Blood, yet as the Intail never descended on the Son or his ipsue, there is no privity in respect to this estate.

But if the Son or his ipsue had survived the Fa: then there would have been privity in respect of Estate as agst all persons claiming under the same intail.

But if the son had died in the life time of the Fa: leaving ipsue, the ipsue of the Son wo^d. have been barred [Hob. 333] The distinctions seem to be:

1st. A Fine by Ten^t. in tail will bar his ipsue in tail, but will not bar any except those who are the ipsue in tail.

2^d. A Fine by par^t. before the Est^e Tail vests in him, either of Est^e or of right, will bar his own Descend^ts within the scope of the intail.

3^d. A fine by the ipsue in tail before the Est^e Tail descends on him, will not bar any except his descend^ts unless the intail devolves upon him & his ipsue

4th. It will in case of such devolution, become a bar to all the more remote ipsue. *

If lands, therefore, be given to *A.* and the heirs *female* of his body, and he have a ſon and daughter, and the *ſon* levy a fine and die, the daughter ſhall *not* be bound; for though ſhe be heir to the ſon, and ſo privy *in blood* to him, (a) yet ſhe is *not* privy to him *in eſtate*, as ſhe does not claim it from or through him. But if lands were given to *A.* in tail general, and his eldeſt ſon, in the life-time of *A.* levy a fine, the entail will be barred on the death of *A.* whether the ſon ſurvive him or not; for the iſſue of *A.* will be privies both in blood and eſtate to *A.'s* eldeſt ſon. (b)

If *a contingent remainder* be limited to *A.* in tail, and, before the contingency happen, he levy a fine, his iſſue ſhall be barred; for though *A.* was never *ſeized* of an eſtate of freehold in the lands ſo entailed, yet, as whoever claims ſuch lands by virtue of the entail muſt claim *from him* as the firſt taker, they muſt be privies both in blood and eſtate to him, and ſo be bound by the ſtatute. 1 Fearne, 535.

* 5th a Fine by the Donee in tail will bar all the iſſue in tail, tho' the fine is levied while the eſtate tail is in contingency. And tho' the event on which the eſt: tail is to vest do not arise in the life time of the Donee.

1 *Fearne*, 521. & see *Butl.* n. (1.) to *Co. Litt.* 191. a. So if lands be given to *A.* and *B.* and the heirs of the body of the ſurvivor, and they *join* in levying a fine, the entail will be barred; as the iſſue, who would claim the entail, muſt be privy both in blood and eſtate to one or other of them; and they were *both* bound by the fine. (a)

2 *Cruiſe*, 163. 8 *Co.* 72. So to huſband and wife and the heirs of their two bodies, and the huſband alone levy a fine; the iſſue would, at leaſt before the ſtatute 32 *Hen.* 8. *c.* 28. *ſ.* 6. have been barred, as they muſt be privy both in blood and eſtate to the huſband as well as to the wife. (b)

2 *Cru.* 162. A widow is prohibited by ſtatute from levying a fine of lands moving from her huſband. (c)

Sometimes it is a Bar by means of a Warranty A fine is no bar to a remainder or reverſion which is in another perſon, ſo he claim within the time preſcribed by the ſtatutes; for the remainder-man, or the reverſioner, claims paramount the cognizor: but, if the tenant in tail have the reverſion (d) in himſelf, he may paſs a clear fee. The operation of a fine, in the latter caſe, would be this:—The tenant in tail would,

(d) *immediate*.

(a) But it seems this fine levied during the contingency of the inheritance, if it is a fine which extends to the inhance, will extinguish the title to the inhancer & not operate by way of Conveyance of the Estate But if a fine sur concesperunt for years were levied, it would operate by way of Estoppel to bind the Ownership under the Est: tail when vested (Wealeo Lower Pollexfen 541)

This should be attended to when it is intd to give an ~~estate~~ ownership depending on the estate tail. The same observation applies to contingt Remrs

(b) If the Wife survives, she will after the Fine, be Tenant in tail in point of ownership for the purpose of suffering a common Recovery, but to make the est: tail descendible from her as an estate tail there must be a confirmation Cro. Car. 476. And in case she survives, without there being any confirmation it is doubtful whether the estate of the Wife will be open to occupancy or will be descendible to her general heirs: It is also doubtful whether she has any devisable Interest Mr Preston thinks she would be considered as having a determinable fee and a devisable Int: sed qu In practice a recovery shd be suffd to avoid the quest:

X So if a Gift be made by the Crown as a reward for services to a person in tail, the Tenant in tail is restricted from barring such entail by Statute [2d Edition]

(c) So a fine &c by the husband alone of Lands of which he is seised in right of his Wife will be void against the Wife and her heirs. So if lands be given to husband & Wife in tail, a fine by the husb: alone ~~the~~ with proclamations tho' it bars the fine will not bar the Wife [9 Co: Beaumd's Case - Cro. Car 476 - 8 Co. 7. 2. Cruise 162.]

Turn over

and by the act 32 Hen. 8 c 28. Fines which create discontinue without barring the issue, for want of proclams are void as against the issue claiming under a gift to the par. & mor. in tail.

But there is a difference between an alienation by a woman Tenant in tail of the gift of her husband, or his ancestors and an alienation by a husband tenant in tail jointly with his wife. The widow cannot bar the issue: the husband may. Those discontinuances only of the husband which do not bar the issue are provided for by the Statute.

(a) a Recovery by Tenant in tail confers a title dependt wholly on the est: Tail: and whenever the Tenant in tail takes that estate & also the fee by descent; or he has the est. tail by descent & the fee by a different title, except by way of Remr of his own purchase by the same deed or will with creates the intail) he should uniformly, in point of prudence, suffer a Recovery. By this means his title will be wholly dependent on the est: tail & the ownership of that estate, & there will be an end to the Title under the revr or remr in fee. Thus the deductn of Title is shortened, & the possibility of incumbrances affecting the remr a revr in fee will be avoided. (Preston's tracts on alienn by Tent in tail.)

would, by ſuch fine, paſs a *baſe fee* to the cognizor, derived from the eſtate tail, and alſo a clear and abſolute fee of which he was ſeized in reverſion; and, as two fees cannot ſubſiſt together in the ſame perſon, the baſe fee ſhall merge in the abſolute one, which would, conſequently, come immediately into poſſeſsion. 1 *Salk.* 338. Symonds *v.* Cudmore. 5 *Durnf. & Eaſt.* 109. note.

But as a tenant in tail may *charge* his reverſion with leaſes, debts, &c. care muſt frequently be taken how the reverſion be brought into poſſeſsion, as the charges would immediately attach. It may, therefore, often be prudent to ſuffer *a recovery*; which would give a new fee not ſubject to thoſe charges.(a) But, even in the caſe of a recovery, the eſtate will be chargeable *as to the acts of the recoveree himſelf*, upon the principle that no man ſhall be permitted to defeat his own charges by an act of his own. A recovery, therefore, only lets in the charge of *the perſon ſuffering it*, while a fine will let in the charges of *the anceſtors ſeized of the reverſion, as well as thoſe of the cognizor*. *Cru. on Fines!* 274. *Cru. on Recov.* 284.

As a recovery immediately bars remainders over in another,(a) which a fine will not do, as well as prevent the charges of the anceſtor of the recoveree from attaching, it is generally the moſt effectual aſſurance.(b) A fine, however, is ſometimes the preferable one, and often the only one to be adopted.

A fine will, in certain caſes, bar *by eſtoppel* where a recovery will not do ſo. A fine may be levied of an entail *in remainder*, without the concurrence of the perſon having the freehold; but a recovery cannot be ſuffered but by the act of the perſon having *the freehold in poſſeſſion*. ſo as to bar the iſſue in tail, but ſuch recovery will be good againſt the tenant in tail & his heirs by eſtoppel.

1 *Cru.* 151. 3 *Co.* 86. a. &c. But, in order to *bar* an eſtate tail, whether in poſſeſſion or remainder, the fine muſt be with *proclamations*, according to the ſtatute; for otherwiſe it will only work *a diſcontinuance*, and it will work a diſcontinuance only when tent. in tail has an eſtate tail in poſſeſſion.

Hargr. n. 1. (*C.*) to *Co. Litt.* 121. a. A fine bars a married woman, it being a matter of record, as the compromiſe of a ſuit; and, in levying it, the woman is examined apart from the huſband, that any

(a) and all condons & collateral limitations annexed to the estate tail.

(b) and it ought to be invariably suffered when circ[s] will permit and the Revr in fee is derived under a title by descent. Indeed there are some Gent. who will not approve a title depending on a fine, if the revr in fee vested in the Tent in tail by descent. They insist upon a recovery. But Mr Prestons says it has always appeared to him that the seller may compel the purch. to accept the title, unless it can be shewn that there are estates not barred by the fine, or that the Ownership is incumbered by means of the fine: or that the purchaser will bear the expence of the Recovery: & then it is reasonable that it should be suffered. It is also observable that if by means of a fine, the ownership of the Estate tail is once merged & the fine of Incumbrances accelerated, a recovery afterds suffered cannot defeat these incumbrances This observation however is not applicable to a Fine & Recovery forming parts of the same Assurance.

(c) as 1st where the concurrence of the freeholder cannot be obtained

2d Where Tenant in tail is dangerously ill in the vacations between the terms: but even then a recovy should be suffd in the ensuing term if the Tent in tail is living. And precaution should be taken to prevent the merger of the Estate tail as by levying a fine Sur Conceperunt for years only or by conveying the reversion in fee to a Stranger Trustee.

3 Where the principal object is to gain a title by Non claim.

4 Where there is an Estate tail in contingency or the person levying the fine is only in the line of succession, & has the chance of an Estate tail & the issue in tail before the Estate tail descends to him. In all these cases the

× the fine may operate 1st as a Demise Sur conceperunt for years. 2nd against the issue in tail, altho' the estate tail is in contingency or has not devolved upon the parent. Whereas a Recovery by a Tenant parent of an estate tail in contingency, an estate tail under a future issue a executory devise, or by the issue in tail before the estate tail descends to them will not bar the issue. A Recovery will, however, in all cases bar the party or his general heirs by estoppel.
[Pells & Brown Cro Jac. 590.]

(a) and whether the fine is with or without proclams it will be equally effectual to bar her title of dower or to convey her inheritance not being an estate Tail. But it is the general practice to have fines proclaimed that they may operate for the security of the title by Non claim It should be remembered that to avoid a fine with proclamations there must be an actual entry made for the declared purpose of avoiding the fine 1 Mod-9 East. 17 and after a fine with proclams no action can be maintained for mesne profits prior to the entry. See v. Hicks 7 Term Rep. 433.

Formerly it was the prevailing practice to levy a fine and suffer a Recovery to bar the estate tail of the wife and the remainders expectant thereon But it is now settled that the husb. is seised in right of his wife and that he may alone make a good Tenant to the writ of entry and that it is sufficient that he & his wife are vouched in the recovery. And when a woman has a separate estate by way of trust she alone may make a good Tenant to an equitable recovery 3 Ves. Junr. 266. Barnaby v Griffin. ×

any compulsion on his part may, as much as possible, be avoided. A fine, therefore, is essential to give validity to her conveyance of freehold lands (~~except where a recovery is required~~*), and is most commonly levied for the purpose of barring her claim to dower. (a)

* Plowd. 514. Eare v. Snow.

As an use immediately arises on a fine, such use is immediately executed by the statute, and may be led or declared as the parties please.

* The only instance in which a fine and recovery are now absolutely necessary is when a title is to be strengthened by means of the statutes of non-claim as well as remainders expectant on an estate tail to be barred.

CHAP. XVI.

OF A RECOVERY.

2 *Bl. Comm.* 357. *Touchſt.* c. 3. p. 37. *Pig. on Recov.* 2 *Cruiſe.*

AS a Fine is the *compromiſe* of a fictitious ſuit, ſo a recovery is a fictitious ſuit *carried on to judgment.*

By the common law, the perſon who had the immediate freehold, or freehold in poſſeſsion, was to anſwer the claims of ſtrangers. Againſt him the writ, or *præcipe*, was brought. Hence, to this day, no recovery can be ſuffered,(a) unleſs *the recoveree has the freehold in poſſeſsion in him*; as the recovery, or ſuit, is founded on the *præcipe*, which can only be ſued out againſt *the tenant of the freehold.*(b)

A perſon, therefore, who has an eſtate tail *in remainder*, cannot ſuffer a recovery alone;

(a) except by way of estoppel.
(b) and the issue in tail will not be barred by a recovery which is good only by estoppel for at the common law they are not bound by estoppels.

(a) But to the validity of an equitable Recovery the concurrence of the beneficial Owner of the first trust of an est: of freehold is necessary: & therefore if A is Tenant for life of the Trust Estate, rem: to B in tail; B cannot suffer a recovery with: the concurrence of A.

and tho' A is the beneficial Owner in respt of the legal Estate so that there is strictly speaking no Trust Estate of freehold his concurrence is equally necessary and the recovery so suffered will be deemed an equitable Recovery.(A)

But an equitable Recovery will not bar ~~any~~ legal Rem^rs However where Lands ~~where Lands~~ were devised to A to the use of A in fee so that he has the whole legal Estate, in trust for B in tail, rem: to A (the Trustee) in fee; Tho' the legal & equitable ownership of the Fee was in the Trustee, yet ~~the~~ it was determined that the recovery of B barred the equitable fee and gave B a right to call for a conveyance of the legal Estate. Robinson & Comyns cases Temp. Talbot 164. for the equitable fee was, as far as respects B, considered as divided from the legal fee was as far as respects B considered as divided from the legal fee, tho' for some purposes the equitable merges in the legal fee.

(b) To bar an estate tail by a common recovery there must be a voucher over (Co. Litt) by the Tent: in tail In that case the common Vouchee makes default

---

(A) The equitable Estate may be understood to be that which gives the beneficial ownership of the freehold. So that if A is tenant for life of a Trust estate, and assigns all his Estate to B by way of mortgage A still continues to be the equitable tenant and should make the tenant to the writ of entry: because the mortgee has in equity only a chattel. This point however is doubted

turn over

alone; the tenant of the particular eſtate of freehold in poſſeſsion muſt concur, againſt whom, or againſt whoſe alienee, the *præcipe* muſt be brought; and the remainder-man muſt come in *by voucher*. A recovery may, indeed, be now ſuffered of *a truſt eſtate*,(a) without the concurrence of the perſon in whom the legal eſtate is veſted; but this is only from neceſsity, and to preſerve an analogy in the aſſurance, or mode of deſtroying an eſtate tail. 2 Cru. 239.

The perſon *againſt whom* the writ is brought is called the *tenant*, as he was always *the immediate tenant of the freehold*. The perſon *ſuing the writ* is called the *demandant*, as he *claims* or *demands* the premiſes as his right and inheritance, alleging that the tenant had *diſseized* him, or at leaſt had come in *under* the *diſseizor*, or in *the poſt*. The tenant then *calls on the remainder-man*, or *the perſon under whom he claims, to warrant his title*, which is denominated *vouching* the perſon, who is thence called the *vouchee*. The vouchee either vouches over, or makes default.(b) On default made, judgment is given that the demandant re-

cover againſt the tenant, and that the tenant recover againſt the vouchee or warranter, and ſo on, which is called the *recovery in value*, or *recompence*, and is always ſuppoſed to go *as the lands would have gone if they had not been recovered.*

When the *præcipe* is brought *immediately againſt the tenant in tail*, it only bars him of the eſtates of which *he is then actually ſeized.*(a) It is, therefore, uſual for him to convey an *eſtate of freehold to another perſon*, that the *præcipe* may be brought againſt ſuch perſon (who is called *the tenant to the præcipe*), *and that ſuch perſon may vouch the tenant in tail*; for if the tenant in tail comes in as *vouchee*, it bars every latent right and intereſt which he may have in the lands.(b)

If the *præcipe* be brought *immediately againſt the tenant in tail*, and he vouches over the *common vouchee*, it is called a recovery with *ſingle voucher*; if againſt *the tenant of the freehold*, and he vouch over *the tenant in tail*, and *the tenant in tail vouch over*

* by some Gentlemen; and it seems that the concurrence of the Mortgagee would be deemed sufficient. See Butl note on Fearne p 61. & Preston on Conveyance? Vol 1 p 24. - And see what fell from Lord Eldon in Wykham a Wykham in Jugd. notes to — Gilb.t on Uses. p 64.

(a) And therefore, if he is Tenant a discontinues & takes back an est.: tail, a recovery suffered by — him as Tenant will only bar the title of the issue under the estate tail depending on the discont.e and will not bar the Est.: tail which he had — prior to the discontinuance; & therefore tho' the — issue are barred in respect of one est.e tail, they may recover in respect of the other Est.e tail: & when the Est.e exists in point of right, the rem.r depending on that estate tail also exists in point of right.

(b) and in the above case supposed, it will bar the 1st. as well as the 2d. Est.: tail & all rem.rs — expect.t thereupon.

(a) But recoveries now never have more than 3 vouchers.
In practice a doubt exists whether there is any case in which a recovery with treble voucher is absolutely necessary.
If Tent in tail creates an estate tail, it seems the gen. opn that if both Tents in tail are vouched jointly, both estates tail will be barred. Mr. Downing was of this opinion. But Mr. Preston thinks that to bar both estates tail, there should be a treble voucher, & that the 2nd Tent in tail sh? vouch the 1st Tent. in tail, & the 1st Tenant in tail vouch the common Vouchee unless there are distinct vouchers how can there can be a recompence for the issue under each estate tail? The idea of Mr. Downing of demand? the lien is an act merely bet. the parties, & in the nature a is rather the consequence of an estoppel.
On the whole Mr. P considers the point still open to doubt & thinks it expedient that there shd? be a treble voucher. Mr. Butler informed him he was of this opin?. and that he did not think Mr. Downing had answered the objection.
(b) There is scarcely an instance (in practice) of a recovery with single voucher.
(c) And also all condons collateral liens annexed to the estate tail & therefore if Tent. in tail det. upon the fall? of a Trustee, or subject to a condon suffer a recovery, he will bar this determinable quality & also the condon; but it does not bar any charge affect? the estate tail as Rents Legacies &c whether they are created by the donor or donee.
(d) He gains the ownership, as far as that ownership was in the donor of the est. tail, & therefore if the Donor was ten. in fee simple the recoverer gains a fee simple. But if the Donor had only a determinable fee, no more will be gained: otherwise a Tent in tail subj. to an executory devise, might by creat? an est. tail & by means of a Recovery suff? by the Tent. in tail bar the limitations over. And Mr. Preston takes it to be clear that he cannot do this
(e) as those created by the Donor, as a former tent. in tail, and are binding on the issue as Rents Legacies Terms for years &c
(f) As when there is a tent. in tail with rem. or rev. in fee by descent or depend?. on a different title from the est. tail
(g) as in the instance of a Tent. in tail in rem. who cannot obtain the consent of the freeholder or Tenant in tail of an estate in contingency.

over the common vouchee, it is called a recovery with *double voucher*; and so on, according to the number of persons vouched.(a) And it is always proper to suffer a recovery with at least a double voucher, if an entail is to be barred, for the reasons before alleged.(b)

A recovery bars not only an estate tail, but all remainders or reversions expectant upon it if they are not in the crown.(c) *Ante.* b. 2. c. 15.

The recoverer always gains a clear and absolute fee(d) on his recovery of the premises, not subject to any charges but to those of the recoveree.(e) Hence it is preferable, in some cases, to a fine, though a fine might bar the estates, as a fine lets in the incumbrances of the ancestors as well as those of the cognizors. In some instances, however, a fine is preferable to a recovery, as the former is *an estoppel* by the statute, where a recovery would not estopp. *Pig. Recov.* 32—34—55. 2 *Cru.* 271.

A recovery may be ſuffered by a tenant in fee-ſimple, in order to ſtrengthen the title.(a) So as it is a ſuit, in the progreſs of which a feme covert is ſecretly examined, it will bar her of her claim to dower.(b)

Plowd. 514. Hare v. Snow.

PRIN-

(a) For this purpose a fine with proclamᵒⁿˢ tho' be levied, no advantage can arise from a recovery.

(b) Tho' the issue in Tail are barred by a fine, the better opⁿ is that they by suffering a Recovery & being vouchee may bar all remᵈˢ & reverˢ expectant on the estate

It is settled that the recovery of the Tent. in tail will have this operation, tho' he has previously converted his estate tail into a determinable fee by means of a fine

A recovery by the owner of a remote Estate tail will bar all remᵈˢ &c expectant on that estᵉ tail but it will not affect prior Estates. And the recovery by a Tenᵗ in tail under a prior estᵉ tail will, when suffered, bar the fee acquired by the Tenant in tail suffering the first recovery.

X It is absolutely necessary that the tenant in tail sho be alive when Judgmᵗ is signed, or on the day to which such Judgmᵗ relates; otherwise the recovᵛ is void. See Broome v Swann 3 Burr. 1596 / Blackstone 496 & 526. And Sunday is for this purpose a dies non juridicus. Ibid. But if the vouchee appears at bar the judgmᵗ relates to the day of such appearance

PRINCIPLES

OF

CONVEYANCING, &c.

BOOK III.

OF CONVEYANCES WITH RESPECT TO PARTIES.

CHAP. I.

OF AN INFANT.

AN Infant may *take by purchaſe*, as he may do any thing which is manifeſtly for his advantage; and, if a feoffment be made, livery may be given to him in perſon, or even to another whom he ſhall appoint as his attorney; though the appointment of an attorney by an infant is not valid in itſelf at law. *Co. Litt.* 2. b. 1 *Roll. Abr.* 730. *Enfant.* (D.) *pl.* 6. See 3 *Burr.* 1794. &c.

Co. Litt. 2. b. But he may wave such conveyance when he comes of age; or, if he do not then actually agree to it, his heirs may wave it after him.

Touchst. 232. *Ibid.* 7. *Cru. Fines,* 110. *Cru. Recov.* 144. 3 *Burr.* 1794. Zouch *v.* Parsons. All conveyances, however, *by* an infant, are voidable by him or his heirs, except a fine or recovery, which are only voidable during his minority.(b) All these conveyances are, nevertheless, if they tend to his benefit, good till actually avoided;(c) but as to fines, the affidavit of acknowledgement by *dedimus potestatem* runs now, by rule of court, that "the parties were of full age;" and, before that rule was ordained, the commissioners were subject to an attachment if they took the acknowledgement of an infant. An act of an infant, which *cannot* be to his advantage, is void *ipso facto*.

Zouch *v.* Parsons. *ubi sup.*

Cru. Recov. 148. It was formerly the practice to petition the King for a privy-seal to enable an infant to suffer a recovery; but this is now disused, and recourse is had at this day to an act of parliament.

An

(a) The Word actually had better be omitted; for whether the infant has agreed or not, is always a question depends on evidence. Entry, acceptance of Rent Paymt &c in pursuance of the deed, or any such Act is evidence of Agreement; But if he is merely passive or rather inactive, his heirs will not be bound.

(b) But if the infant is injected during his minority a fine may be avoided after he is adult because his infancy was hid during his minority

Respecting recoveries there is this difference. A Recovery suffered by an infant in person is avoidable only during his minority.

But if a Recovery is suffered by him upon a want of attorney it may be avoided after he is adult 2 Cruise 164

(c) The decision of Touch ve Parsons certainly goes the whole length of this proposition, but that case has never been generally acted upon. There an infant, the heir of the Mortgagee reconveyed, and the Conveyance was supported. Before that determin it was understood that no deed (except a single Bond for necessaries) was binding on an infant: and there are many cases which beat his Grant as void; and hence the distinction that a feoffmt in person was voidable only, & that a feoffmt by Atty was actually void. Because as the infant could make a deed, the livery was not authorized by the letter of Atty, the same being a nullity.

(a) She may be bound as to dower &c by the acceptance of such a settlement. Carruthers v Carruthers 4 Bro. Ch. Ca. 500. Drury & Drury ibid 506. But it seems the better opinion at this day, is that no settlemt. by an infant of his real estate will be binding on him if he thinks proper, when a adult (& if a female free from Coverture) to avoid the same. Clough v Clough 3 Wood 453.

(b) And such Lease will be binding on the infant during his minority. And if the Lease is to continue beyond the age of minority, it is not actually void It is only voidable by the infant.

An infant truſtee or mortgagee may be ordered to convey even by fine, if not by recovery (See 3 *Atk.* 16.), by a court of equity, under the ſtatute of the 7th *Ann. cap.* 19. and that act extends to the conveyance of copyholds. 1 *Watk. Copyh.* 63.

So an infant may, in ſome caſes, exerciſe a power, as where he is *a mere inſtrument*; but it ſhould ſeem not otherwiſe. *Unleſs there is a diſpenſation with infancy.* *Powell on Powers*, 43—54. & 1 *Ves.* 304.

And an infant may be bound by a fair and reaſonable marriage-ſettlement. (a) 1 *Bro. C. C.* 152. Williams *v.* Williams.

A guardian may make leaſes during the minority of his ward. (b) 2 *Roll. Abr.* 41. *Garde.* (2.) *pl.* 4. *Bac. on Leaſes. B. & I.* (5.) p. 138.

An infant may be ſeized to an uſe *. * *Sand. Uſes.* 87.

And an eſtate may be limited by *way of remainder*, or *of uſe*, or given *by deviſe*, to an infant *en ventre ſa mere*; but an *immediate* grant to ſuch infant would not be good, as it would be *in futuro*. In the caſe of a deviſe, the fee deſcends to the teſtator's heirs at law till the child is born; in that of the remainder, the freehold is in

See of the Stat. 10 & 11 *Willm.* III. N. (3.) to *Co. Litt.* 298. a. & *Watk. on Deſc.* ch. 4.

in the particular tenant; and the remainder veſts in the child, though unborn, by the ſtatute 10 & 11 *Will.* III. and in the caſe of the uſe the legal eſtate is in the truſtee. +

CHAP.

(a) In consequence of this Statute, the Limitations formerly ~~in~~ introduced in Wills & Settlem^ts (giving an estate of freehold to the wife, if existent at her husbands death, & limit^g ests. to subseq^t. born childr.) are omitted.

Under a bequest to childr. living at the death of a parent, a even a Stranger, a child in ventre sa mere may take. 2 H. Blackstone 399. 401. Doe v Clarke.

X But if Lands descend, a Sister a Uncle takes as immediate heir tho' there is a Child in ventre sa mere which if born would be the heir, & the Sister or Uncle is entitled to the mesne profits, but in case of the recov. the unborn Child when born will be entitled to the mesne profits

So if a gift is made to the heir or heirs of the body and the heirs are to take as purchasers the estate will vest in the Sister a Uncle of the heir at the time & will not be devested by the birth of a more immediate heir But in case of descents the birth of a nearer heir will determine the title of the Sister or Uncle or admit such heir (if a Coparcener) to an equal Share.

(a) To the prejudice of the other; but if the husband alienor survives, the alienee will be bound & on him & his heirs. Another Conseq.ce of the Unity of the persons of husb.d & wife is that neither of them can make any grant to the other. Litt. s 168.

But the wife may be the Atty of her husband, & the husb.d or wife may convey to the use of the other a exercise a power in favour of the other, & may be the devisee & appointee of the will of the other.

The restriction applies only to Common Law Conveyces not to Conveyces to uses or to Wills. Co. Litt. 112 a

And even where a woman had an authority to sell which is a Common Law Auth.y it was held that she might exercise that authority by a sale to her husb.d Co. Litt 112. (a)

Unless thro' the medium of a power a married woman cannot make any Conveyce of her freehold or inheritance, except by matter of record as a fine or recovery.

The deed of a married woman is, generally speaking, absolutely void: at least no est.e of freehold will pass. On the right of the husband over the property of his wife & of acts inter se, & which are very material to be known [See Butl.r Co. Litt 351. (a) No. 1. and Com Dig. Baron & Feme.

CHAP. II.

OF HUSBAND AND WIFE.

AS the Huſband and Wife are but one perſon in law, if an eſtate be limited to them, they ſhall not take as joint-tenants (for a joint-tenancy neceſſarily implies a plurality of perſons), but the entirety is in each; and neither can alien without the other.(a) If it be limited to the huſband and wife and another perſon, that other perſon ſhall take a moiety in joint-tenancy with the huſband and wife; and the huſband and wife ſhall have the other moiety by entireties, as they are but one perſon in law.

Litt. ſ. 291. & *Co.* upon that ſect. 5 *Durnf.* & *Eaſt.* 652. Doe *v.* Parratt. 2 *Cru.* 213.

CHAP.

CHAP. III.

OF A FEME COVERT.

2 *Bl. Comm.* 292. *Touchſt.* 232. A *FEME COVERT* may *accept* an eſtate; and it ſhall be good till avoidance. But *her conveyance* is abſolutely void, and not merely voidable, except it be by matter of record. She can only be bound by fine, recovery, or act of parliament.

Sand. Uſes. 88. She may be ſeized to an uſe.

2 *Bl. Comm.* 318. *Bac. on Lea.* (C.) The huſband and wife, however, may together make leaſes of the wife's lands for three lives, or a certain number of years, by the ſtatute 32 *Hen.* VIII. c. 28.(m)

Powell on Powers, 31. 42. *Hargr.* n. (6.) to *Co. Litt.* 112. a. A power may be given to a married woman: and if a power be given to a *feme ſole*, which it is intended ſhe ſhould

(a) So as they conform to the provisions of that Statute.

But a lease by a husband & Wife of the Lands of the Wife for a term of yrs is voidable only & not void, tho the provisions of the Stat. are not complied with, so as a rent is reserved. Vide Bacon's Abr. Tit. Lease.

But a Mortgage for years by husband & Wife of the Inheritce of the Wife seems to be void, as against the Wife, but capable of confirmn by acts done by her after the death of her husband amounting to a redelivery. Goodright ags Thapham Coup 201 Seag.

(a) Unless there is a dispensation with Coverture it seems Power, coupled with an interest, cannot be exercised dur. coverture.

But it may be relcd or extinguished by a fine &c and a power or authority not coupled with an interest may be exercised during coverture tho' there is not any such dispensation. Harg. Co Litt 112. (a) and tho' her husband does not join Ibid.

And it seems a married woman alone may convey Lands in performance of a Condon (Harg. Co. Litt. Ibid. W. Jones. 137.) annexed to her estate in these lands.

(b) as far as she is made a feme sole by the nature of the trusts. See Com Dig!. Baron & Feme.

N.B. Deeds of separation between husband and wife are constantly carried into effect notwithstanding the objection to the wife's capacity. See Lord Eldons observation in St. John v St. John 11 Ves. Junr.

If property is given or settled to the separate use of a Feme Covert, she has an absolute power of disposal, but if an express power is given her qualified by a restriction that it is not to be exercised by anticipation, it seems that will restrain her. [See Parkes v White 11 Ves Junr. & Brown v Like 14 Ves. Junr.

execute though ſhe afterwards marry, it ſhould be expreſsly ſaid "whether ſole or covert."(a)

So a married woman may be enabled to diſpoſe of her property, by limiting ſuch property to her *ſeparate uſe*; in which caſe ſhe ſhall be conſidered in equity as a *feme ſole*.(b) 1 *Ves.* 303—518. 3 *Bro. C.C.* 8.

So the huſband, on marriage, may give the wife power to make a will, and it ſhall be good. See 2 *Ves.* 612. &c.

CHAP.

CHAP. IV.

OF THE KING.

2. *Bl. Comm.* 346. S. 2. *Com. Dig.* Grant (G) 1. *Cru.* 98. 2. *Cru.* 144. *Pigg.* 74.

GENERALLY, the King cannot either grant or take but by matter of record; as by deed enrolled. He may *take* by *fine*, though he cannot be a cognizor; nor can he be a party to a recovery, for the King cannot be ſued.

Sand. Uſes. 88.

Nor can the King be ſeized to an uſe.

Com. Dig. Grant (G) & Aſſignment. (D).

But the King may aſsign certain things, as a *choſe en action*, &c. which the ſubject cannot.

2. *Cru.* 255. *Com. Dig.* Eſtates. (B. 31.)

A recovery by the ſubject cannot affect the iſſue in tail or any remainder, when the ultimate remainder or reverſion is in the crown. (a)(b)

CHAP.

(a) and the estate tail as of the Gift of the Crown for serv
performed; At this day the King cannot make
any Grants, except for part[ar] Est[s] by way of
Lease, without an act of parliament.

Therefore for Lands escheated &c and Lands
purchased by aliens, there must be an act of
parliament to give validity to the title.

(b) 2 H. in common & ordinary cases Tenant in ta
may not bar the rem[r]s or rev[n] in the Crown?
Cruise seems to say not Cru 265. sed qu[e]

CHAP. V.

OF THE QUEEN.

THE Queen may alien and purchaſe without the concurrence of the King. She may levy a fine, as any other ſubject: but it is ſaid, that ſhe cannot be ſeized to an uſe. 1 *Bl. Com.* 220. *Touchſt.* 232. 1. *Cru.* 99. *Sand. Uſes.* 88.

CHAP. VI.

In notes to this & the next page see page 148 & 149.

OF CORPORATIONS.

OF their capacity to take. See 1 *Bl. Comm.* Chap. 18. 478-9.

Davys's Rep. 44. b. Grants by Corporations muſt be by deed under their common ſeal; and ſuch deed, ſo ſealed, is good without delivery.

1. *Salk.* 193. But they may bind themſelves by a matter of record without their ſeal(a)

Coke's Read. on Fines. Read. 7 & 8. 1. *Cru.* 118, 178. Corporations *aggregate* cannot levy a *fine*, as they can only appear by attorney; and a fine muſt be levied in perſon. Though it is ſaid that a corporation *ſole* may be a cognizor, for he may appear perſonally: but corporations of either kind may be *cognizees.* (b)

But a corporation cannot be ſeized to an uſe; and, therefore, it cannot covenant to ſtand ſeized, or make a bargain and ſale. (a) See *Sand. Uſes.* 446, & *Ante* b. 1. ch. 20.

And, therefore, if a leaſe and releaſe be made by a corporation, the inſtrument, on which the releaſe is to be grounded, muſt not have the words—"doth *bargain and ſell*," (d) but thoſe of "*grant and demiſe*;" as it muſt operate as a *leaſe*, ſtrictly, and *not as a bargain and ſale:* and on ſuch leaſe *the leſſee muſt actually enter into the lands*; (e) for, before entry, he can have no poſſeſsion on which the releaſe can operate.

Eccleſiaſtical corporations are reſtrained from aliening, except for certain terms, by ſtatute. 2 *Bl. Comm.* 320, 1. *Bac. Leaſes.* E. F. G. H.

THE END.

London: Printed by G. Woodfall, No. 22, Paternoſter-Row.

Lately publiſhed, by the ſame Author:

I. AN ESSAY towards the further Elucidation of the LAW OF DESCENTS.

II. AN ENQUIRY INTO THE TITLE AND POWERS OF HIS MAJESTY AS GUARDIAN OF THE DUCHY OF CORNWALL during the late Minority of its Duke.

III. REFLECTIONS ON GOVERNMENT IN GENERAL, with their Application to THE BRITISH CONSTITUTION.

IV. THE LAW OF TENURES; by the late LORD CHIEF-BARON GILBERT; with AN HISTORICAL INTRODUCTION ON THE FEUDAL SYSTEM, and copious NOTES and ILLUSTRATIONS.

V. A TREATISE ON COPYHOLDS; in two Volumes: Vol. I. containing the Doctrine of *Manors, Grants, Surrenders, Entails, Remainders, Executory Intereſts and Truſts, Admiſſions, Fines, Forfeitures, Extinguiſhment and Suſpenſion, and Enfranchiſement.*—Vol. II. *Courts, Cuſtoms, Freebench and Curteſey, Guardianſhip, Licence, Heriots, Suit, Rents, Corporal Services,* and the Application of *the Statute Law to Copyhold Property.*

VI. AN ENQUIRY INTO THE QUESTION, *whether the Brother of the paternal Grandmother ſhall ſucceed to the Inheritance of the Son, in preference to the Brother of the paternal Great-Grandmother?* The Affirmative having been advanced by Mr. JUSTICE MANWOODE, acceded to by Mr. JUSTICE HARPER, Mr. JUSTICE MOUNSON, and the LORD DYER; and adopted by LORD BACON LORD HALE, AND THE LORD CHIEF BARON, GILBERT; and the Negative maintained by Mr. ROBINSON, (the late CHIEF JUSTICE OF GIBRALTAR) and Mr. JUSTICE BLACKSTONE.

(a) When Corporations want to make a lease in the Lands, it is the practice to seal a Lease & authorize an atty to enter & deliver the same on the Lands. 1 Vent. 257.

It is more advisable that they should introduce the entry on their own act and afterwards make the lease; or qu if it is not still more advisable to authorize an attorney to enter seal and deliver the lease.

A Devise cannot be made to a Corpor.n except to charitable uses under 43 Eliz.

To enable a Corpor.n to purchase they must have a licence from the Crown, either by their charter or by special ~~limitation~~ grant or by act of parliament.

A Corpor.n aggregate has no capacity while there is a vacancy of its head, as a Mayor &c. Co. Litt 264(a) and there cannot be any grant by a Corpor.n to its head: as the Mayor Cean &c.

But a Corpor.n may grant to one of its members not being its head.

A Corpor.n aggregate may have a term but a sole Corpora except the Chamberlain of London cannot have a term or chattel transmissible to successors. Cpay on Estr. Ch. Dee.

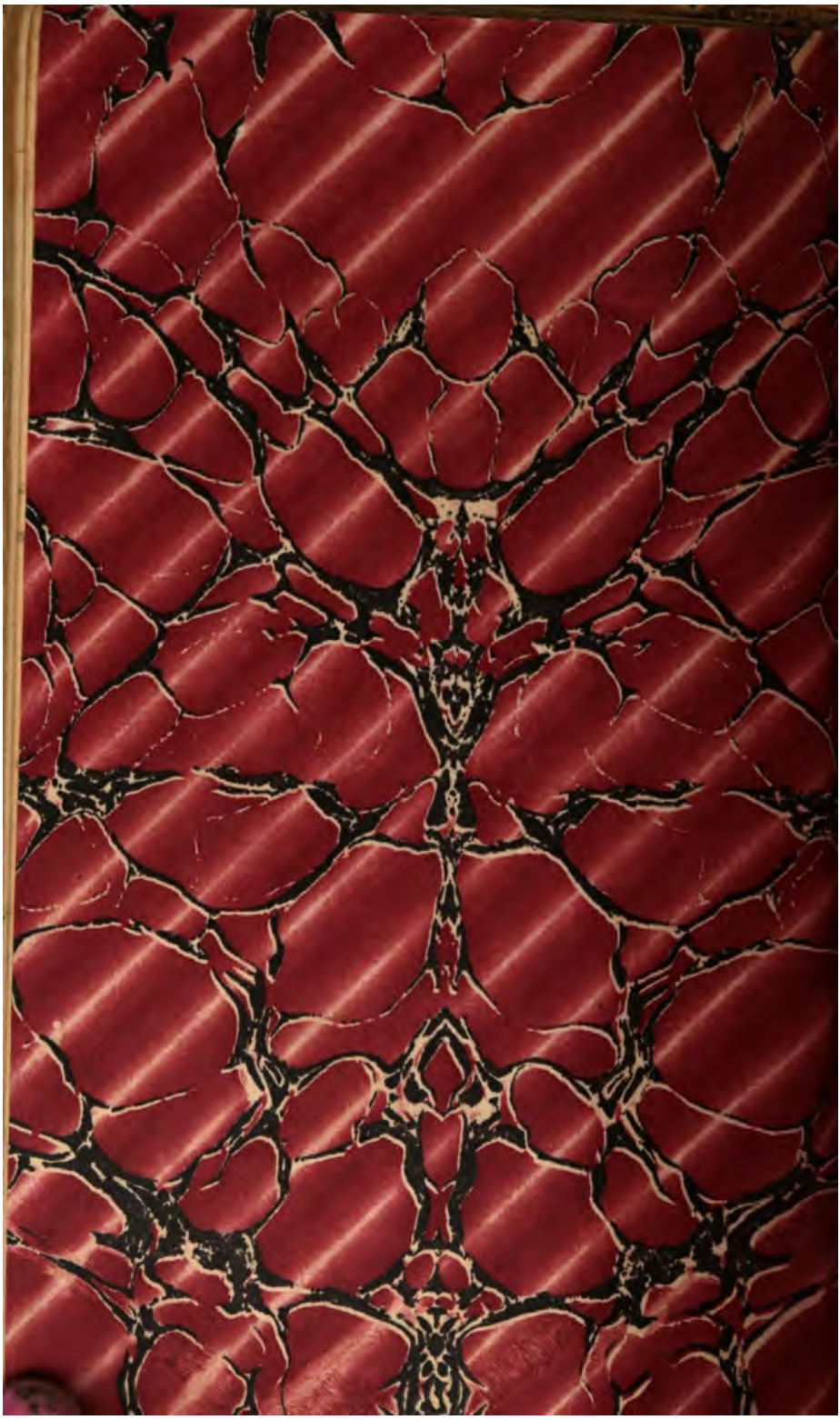
Notwithstand.g the Decision in Com. Dig.t Corpon.n pa 16. a Corpor.n may have an est: for lives if natural individual persons are named as the lives. Cpay on Estr.

(b) a Corpor.n which has an absolute Ownership may be barred by Non claim in a Fine. Plow Com. 537 course of those who have not an absol. Estate, as Bishops &c. There each Successor will have 5 Years to make his claim

(c) See Supra. p. 106 that the Bargain and Sale will be good as a Corporation may give an use tho' they cannot stand seized to an use

(d) Will not these words if necessary operate as a ~~demise~~ Common Law Demise.[2] Mr. Preston thinks they may.

(e). This is the general and certainly the safe practice but if the lands are held in rev^n or rem^r the release would operate as a grant of the rev^n or rem^r in fee, & the Lease for a year would operate as a Grant for the term, and so give an estate capable of enjoyment.



DL AWF QCp
Principles of conveyancing,
Stanford Law Library
3 6105 044 291 560